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CALIFORNIA REPORTER

IN VOLUME

37 PACIFIC REPORTER
SECOND SERIES

1 Cal.2d 687

PEOPLE v. ANDERSON.

Cr. 3744.

Supreme Court of California.

Oct. 25, 1934.

Rehearing Denied Nov. 22, 1934.

1. Homicide 🔑18(5)

Homicide committed in perpetration of, or in attempt to perpetrate, robbery, is murder in first degree; the law conclusively presuming premeditation (Pen. Code, § 189).

2. Criminal law 🔑44

"Attempt to commit a crime" consists of intent to commit it and direct, ineffectual act done toward its commission.

"Preparation antecedent to commission of crime" consists in devising or arranging means or measures necessary for commission of crime, while "attempt" is direct movement toward commission after preparations are made, and must be manifested by acts which would end in consummation unless frustrated by extraneous circumstances.

[Ed. Note.—For other definitions of "Attempt to Commit Crime" and "Preparation for Commission of Crime," see Words & Phrases.]

3. Criminal law 🔑44

Whenever design of person to commit a crime is clearly shown, slight acts in furtherance of design will constitute an attempt to commit the crime.

4. Homicide 🔑18(5)

Conduct of accused in approaching theater ticket office and pulling out pistol which was discharged as he was putting it up in cage *held* "attempt to perpetrate robbery," so that homicide perpetrated in connection therewith, whether intended or not, was murder in the first degree.

[Ed. Note.—For other definitions of "Attempt to Rob," see Words & Phrases.]

5. Criminal law 🔑911

Motion for new trial is addressed to discretion of trial court.

6. Homicide 🔑319

Alleged newly discovered evidence offered as ground for new trial of prosecution for homicide committed in attempt to perpetrate robbery, and which allegedly tended to disclose that series of robberies committed by defendant had been planned in league with confederate who shared in spoils, *held* insufficient to authorize new trial, since evidence did not mitigate defendant's offenses.

In Bank.

Appeal from Superior Court, San Francisco County; Louis H. Ward, Judge.

Edward Anderson was convicted of murder and robbery, and he appeals.

Judgment affirmed.

Gerald J. Kenny, Public Defender, and James A. Toner, Asst. Public Defender, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., Seibert L. Sefton, Deputy Atty. Gen., and Matthew Brady, Dist. Atty., and Wm. W. Murphy and Peter J. Mullins, Asst. Dist. Attys., all of San Francisco, for the People.

WASTE, Chief Justice.

In an indictment containing two counts, the defendant was charged with murder and robbery. Upon his arraignment, he entered a plea of not guilty to each charge. The jury found him guilty on both counts. The verdict on the murder count fixed the degree as of the first and was returned without recommendation. It therefore carries with it the extreme penalty. Defendant has appealed from the judgment and from the order denying his motion for a new trial.

The evidence shows that during the months of November and December, 1933, the defendant engaged in a series of robberies in the city and county of San Francisco, in each of which robberies a gun was employed. Three of these offenses preceded the homicide and robbery, of which defendant stands convicted. On the evening of November 28, 1933, between the hours of 6 and 8 o'clock, the defendant approached the ticket office of the Curran Theatre with the intent, as he freely admitted while on the stand in his own defense, of perpetrating a robbery. When approximately two feet from the ticket office, he drew an automatic revolver from its place of concealment in his clothes. He testified that the gun was discharged as he "was just going to put it up in the cage"; that he had "just cleared the gun over the railing when it went off." In explanation of the firing of the gun, he testified: "I suppose I must have pulled the trigger; I don't remember * * * how it happened." As a result of the discharge of the weapon, the deceased, who was in the ticket office, was shot through the chest. He died from the wound and the resulting hemorrhage. Defendant immediately fled the scene of the shooting in a taxicab. He proceeded directly to the Coffee Cup restaurant, where he held up the cashier and robbed the cash register of approximately $60. He stands convicted of this offense as well as of the homicide growing out of the attempt to rob the Curran Theatre. Within the next succeeding twenty days he perpetrated three other robberies. He was apprehended on December 18, 1933, after a bank robbery, and was subdued and captured following a gun duel with the police, in which one officer was shot. While on the stand he admitted, without objection, these several offenses.

[1] The law is well settled that a homicide committed in the perpetration of robbery or in an attempt to perpetrate robbery is murder in the first degree. Pen. Code, § 189. In such cases the law conclusively presumes premeditation, and the Legislature has declared that they shall be deemed and held to be murder in the first degree. People v. Murphy (Cal. Sup.) 32 P.(2d) 635.

[2, 3] Defendant seeks to exclude his case from the effect of this rule by urging that the evidence is insufficient to establish that the homicide was committed in an attempt to perpetrate robbery. He contends that at best the evidence discloses a mere intent to commit robbery and falls short of showing an attempted robbery.

An attempt to commit a crime consists of two elements, viz., the intent to commit it, and a direct, ineffectual act done toward its commission; in other words, there must be a unity of intent and overt act. 16 C. J. 113, § 92; 8 R. C. L. 277, § 294. There is, of course, a difference between the preparation antecedent to the commission of an offense and the actual attempt to commit it. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement toward the commission after preparations are made, and must be manifested by acts which would end in the consummation of the particular offense unless frustrated by extraneous circumstances. People v. Stites, 75 Cal. 570, 575, 576, 17 P. 693; People v. Mann, 113 Cal. 76, 45 P. 182. Whenever the design of a person to commit crime is clearly shown, slight acts in furtherance of the design will constitute an attempt. Stokes v. State, 92 Miss. 415, 46 So. 627, 629, 21 L. R. A. (N. S.) 898. People v. Moran, 18 Cal. App. 209, 211, 122 P. 969, presented a case of an attempt to commit robbery wherein it was held that the pushing open of the door of a building and partial entry through the same were overt acts that went beyond mere acts of preparation.

[4] In view of the authorities, we cannot agree with the defendant in the conclusion that the evidence fails to disclose any overt act reasonably directed toward the consummation of the intended robbery. Defendant's conduct in concealing the gun on his person and going to the general vicinity of the Curran Theatre with intent to commit robbery may, for present purposes, be classified as mere acts of preparation, but, when he "walked in there [Curran Theatre entrance] about two feet from the grill" and "pulled out the gun," and "was just going to put it up in the cage when it went off," we are satisfied that his conduct passed far beyond the preparatory stage and constituted direct and positive overt acts that would have reasonably tended toward the perpetration of the robbery had the gun not exploded, for one reason or another, and frustrated the plan to consummate the offense. We see no escape from the conclusion that defendant's conduct constituted an attempt to commit robbery. This being so, the homicide perpetrated in connection therewith, whether intended or not, is murder in the first degree under the authorities cited above.

[5, 6] We find no error in the order denying defendant a new trial. Such a motion is addressed to the sound discretion of the trial court. The alleged newly discovered evidence tending to disclose that the series of robberies mentioned above had been planned by defendant in league with a confederate, the latter sharing in the spoils, does not in any manner mitigate the offenses of which defendant stands convicted. Moreover, substantially the same evidence was offered by the defendant while on the stand. He testified that a named person had purchased the

gun and cartridges, had designated certain places to be robbed, and had shared in the spoils of such robberies.

The judgment and order denying a new trial are, and each is, hereby affirmed.

We concur: SHENK, J.; IRA F. THOMPSON, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

1 Cal.2d 749

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

S. F. 15138.

Supreme Court of California.
Nov. 1, 1934.

1. Certiorari 🔑14
No appeal being provided for by statute from probate court's order vacating its order settling testamentary trustee's accounts current, question of its jurisdiction to make such order is reviewable by Supreme Court on certiorari.

2. Trusts 🔑328
Probate court has no jurisdiction to vacate its order settling testamentary trustee's accounts current on collateral attack, unless shown to be void on face thereof.

3. Judgment 🔑485
Judgment or order is void on its face, and hence subject to collateral attack, when shown to be void by inspection of judgment roll.

4. Trusts 🔑297
Statutory proceeding for settlement of testamentary trustee's account is in rem (Code Civ. Proc. § 1699; Probate Code, § 1120).

5. Judgment 🔑496
Same presumptions apply as to validity of probate court's final orders and decrees as to judgment and order of any court of general jurisdiction.

6. Trusts 🔑331
Application in administration of deceased's estate to set aside final order previously entered therein, such as order settling testamentary trustee's account, is collateral attack, on which such relief cannot be granted, unless order is void on its face (Code Civ. Proc. § 1699; Probate Code, § 1120).

7. Trusts 🔑298
Filing of petition, stating matters required by statute, for settlement of testamentary trustee's accounts current, vests jurisdiction in probate court, whether jurisdictional facts alleged accord with actual facts or not (Code Civ. Proc. § 1699; Probate Code, § 1120).

8. Trusts 🔑298
Omission of names and addresses of remaindermen under testamentary trust provision and distribution decree from trustee's petitions for settlement of his accounts current did not deprive probate court of jurisdiction (Code Civ. Proc. § 1699; Probate Code, § 1120).

9. Trusts 🔑331
Statutory notice of hearing on testamentary trustee's petitions for settlement of his accounts current by posting thereof at court house is constructive notice of proceedings to everyone, and order entered pursuant to such hearing is conclusive on all parties in interest (Code Civ. Proc. §§ 1699, 1701; Probate Code, §§ 1120, 1123, 1200).

10. Trusts 🔑303
Absence of personal notice of proceedings for settlement of testamentary trustee's accounts current does not deprive any person in interest of constitutional rights (Code Civ. Proc. § 1699; Probate Code, §§ 1120, 1200).

11. Trusts 🔑328
Probate court was without jurisdiction to vacate its final orders, approving testamentary trustee's accounts current, because of failure to mail notice of hearing to beneficiary in remainder of trust estate after life tenant's death, where judgment rolls disclosed that all statutory requirements were complied with (Code Civ. Proc. §§ 1699, 1701; Probate Code, §§ 1120, 1123, 1200).

12. Judgment 🔑490(1)
Rule that judgment may be declared void on collateral attack for admitted lack of jurisdiction of party, though otherwise valid on its face, presupposes that party resisting attack admits facts showing that constructive or personal service of summons was not made on party attacking judgment and allows introduction of evidence of such fact without objection.

13. Trusts 🔑331
Orders settling testamentary trustee's accounts current cannot be *held* void on collateral attack by beneficiary, moving to vacate them for failure to include in petitions

for settlement names and addresses of beneficiaries and mail notices of proceedings to them, in absence of admission of probate court's lack of jurisdiction by trustee or evidence that statutory steps respecting notice were not followed to extent necessary to give court jurisdiction (Code Civ. Proc. §§ 1699, 1701; Probate Code, §§ 1120, 1123, 1200).

14. Courts ⚷200¼
Probate court has no general equity jurisdiction; its general jurisdiction being confined to settlement of deceaseds' estates.

15. Courts ⚷200¼
Probate court may apply equitable and legal principles in aid of its functions.

16. Judgment ⚷511
Probate court, being without general equity jurisdiction, cannot avoid its final orders or decrees on collateral attack for extrinsic fraud in obtaining them.

◆

In Bank.

Certiorari proceeding by the Security-First National Bank of Los Angeles to review and annul an order of the Superior Court in and for Los Angeles County and Elliot Craig, as Judge thereof, vacating orders settling and approving the first nine of petitioner's ten accounts current as trustee under the will of Susan Emerson Wilshire, deceased.

Order annulled.

Newlin & Ashburn and O'Melveny, Tuller & Myers, all of Los Angeles (Louis W. Myers and A. W. Ashburn, both of Los Angeles, of counsel), for petitioner.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles (Holbrook, Taylor, Tarr & Reed, of Los Angeles, of counsel), for respondents.

Kimball Fletcher, Ethel H. Harradine, S. C. Schaefer, A. J. O'Connor, James Westervelt, L. H. Phillips, M. I. Church, Jack Leonard, Marion P. Betty, and Hanna & Morton, all of Los Angeles, amici curiæ.

SHENK, Justice.

This is a proceeding in certiorari to annul an order of the respondent court vacating orders settling and approving the first nine accounts of the petitioner as trustee of a testamentary trust.

The petition sets forth as exhibits the judgment rolls on the several proceedings settling said accounts of the trustee, the petition for probate of the will, the decree of distribution, and other portions of the records in previous proceedings relied upon by the party moving to vacate said orders. The matter is submitted on a general demurrer to the petition.

The will of Susan Emerson Wilshire was admitted to probate in December, 1920. In November, 1921, a decree was entered distributing the sum of $71,946.32 to the petitioner's predecessor, as trustee, being the balance after deduction for inheritance taxes, etc., of a trust fund of $75,000 directed by the will of the testatrix to be established for the benefit of her sister, Sallie B. Wolcott. The income from the fund was directed to be paid to Sallie B. Wolcott during her lifetime and the remainder to W. R. Thomas, Caroline C. Griffin, Mary Dolan, Sarah T. Haddon, and Susan T. Pearman, nephews and nieces of the testatrix. Subsequently and periodically the trustee filed its accounts current, ten in all. Pursuant to notice given and a hearing had on each thereof, the probate court made its order settling and approving each account as rendered. These orders had long since become final when the motion was made to set aside and vacate said ten orders approving the accounts. No point is urged against the validity of the order granting the motion as to the tenth current account; the application, as to that account, having been made within the time prescribed by section 473 of the Code of Civil Procedure.

The application to vacate the orders approving the first nine accounts of the trustee was made by W. R. Thomas, one of the nephews of the testatrix and a remainderman under the trust provisions and the decree of distribution. The motion was addressed to the respondent court sitting in probate in the matter of said estate. The grounds of the motion were that the respective orders were void because the trustee failed to include in its petition for settlement the names and addresses of, and to give notice to, the beneficiaries as required by sections 1120 and 1200 of the Probate Code and section 1699 of the Code of Civil Procedure; and on the further ground that the petition in each instance falsely stated that Sallie B. Wolcott was the sole beneficiary of the trust, when, in fact, the trustee knew that W. R. Thomas was such beneficiary and that he resided at Houston, Texas.

[1] No appeal from the order vacating the orders settling and approving the accounts is provided for by statute; hence the question of the jurisdiction of the court to make such an order is reviewable in the present proceeding. Tinn v. U. S. District Attorney, 148 Cal. 773,

84 P. 152, 113 Am. St. Rep. 354; 4 Cal. Jur. 1034; 11a Cal. Jur. 217.

[2, 3] Unless the orders settling the first nine accounts current are shown to be void upon the face thereof, the probate court had no jurisdiction to vacate them on a collateral attack. A judgment or order is determined to be void upon its face when it is shown to be void by an inspection of the judgment roll. In re Estate of Davis, 151 Cal. 318, 324, 86 P. 183, 90 P. 711, 121 Am. St. Rep. 105; Latta v. Tutton, 122 Cal. 279, 282, 54 P. 844, 68 Am. St. Rep. 30; Hill v. City Cab Co., 79 Cal. 188, 190, 21 P. 728; Fletcher v. Superior Court, 79 Cal. App. 468, 474, 250 P. 195.

The eighth current account of the trustee was filed in November, 1930. Section 1699 of the Code of Civil Procedure, applicable to that and all preceding accounts filed by the trustee, provided:

"Where any trust has been created by or under any will to continue after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trusts.

"And any trustee created by any will, or appointed to execute any trust created by any will, may, from time to time, pending the execution of his trust, or may, at the termination thereof, render and pray for the settlement of his accounts as such trustee, before the superior court in which the will was probated, and in the manner provided for the settlement of the accounts of executors and administrators. The trustee * * * shall, for that purpose, present to the court his verified petition, setting forth his accounts in detail, with a report showing condition of trust estate, together with a verified statement of said trustee, giving the names and postoffice addresses, if known, of the cestuis que trust, and upon the filing thereof, the clerk shall fix a day for the hearing, and give notice thereof of not less than ten days, by causing a notice to be posted at the court house in the county where the court is held, setting forth the name of the trust estate, the trustee, and the day appointed for the settlement of the account. The court, or a judge thereof, may order such further notice to be given as may be proper. * * *"

In the matter of each of the first eight accounts current, the trustee filed a verified account and petition "as trustee for Sallie B. Wolcott under the last will and testament of" Susan E. Wilshire, deceased, and set forth among the other matters required by the section quoted, "that the name of said beneficiary is Sallie B. Wolcott, and her address is Redondo Beach, California." No other person was mentioned as a beneficiary under said trust. In each instance the clerk set a day for the hearing and settlement of the account, and notice was duly posted in accordance with the requirement of said section 1699 of the Code of Civil Procedure. The court made its final order as to each account after such notice and hearing thereon. No order was made in any instance for further notice. W. R. Thomas at no time filed any request for special notices. He had appeared personally in the matter of the probate of the will by joining in an answer to an opposition to its probate instituted by one Henry Gaylord Wilshire.

Subsequent to the filing and settlement of the eighth account current, section 1699 of the Code of Civil Procedure was repealed and the provisions hereinbefore quoted were reenacted, with some changes and additions, in sections 1120 and 1200 of the Probate Code. Instead of the requirement that the petition give the names and post office addresses, if known, of the cestuis que trust, section 1120 requires that the petitioner give "the names and post-office addresses, if known, of the beneficiaries." By section 1120 the clerk is required to give notice for the period and in the manner directed by section 1200 of the Probate Code, which is the same notice required by former section 1699 of the Code of Civil Procedure. Section 1120 of the Probate Code in addition provides that "notice of the hearing shall be mailed to the beneficiaries whose addresses are known, as provided in section 1200, whether they have requested special notice or given notice of appearance or not."

The petition presenting the ninth account current of the trustee contained the same allegation respecting the beneficiary of the trust, viz.: "The beneficiary of this trust and her address, in so far as said address is known to the trustee, are as follows: Sallie B. Wolcott, Redondo Beach, California." Due notice of the hearing was posted in accordance with the provisions of section 1200 of the Probate Code, and the notice was mailed to Sallie B. Wolcott, Redondo Beach, Cal., and Ernest K. Hartman, assignee of Susan T. Pearman, Title Insurance Building, Los Angeles, Cal. The notice was not mailed to W. R. Thomas nor to any other beneficiary or remainderman of the trust estate.

For the purposes of this proceeding, the petitioner does not dispute the fact that the remaindermen, as well as the cestui que trust, Sallie B. Wolcott, were beneficiaries under the trust, and that the addresses of the beneficiaries and particularly of W. R. Thomas were alleged in the petition for the probate of the will. The respondents contend that these facts prove conclusively the lack of jurisdiction of the probate court to make the several orders settling the nine accounts of the trustee and the consequent invalidity thereof, for the reason, so it is claimed, that the court acquired no jurisdiction of W. R. Thomas in said nine proceedings.

[4-10] The question is not concluded by the undisputed facts. A proceeding pursuant to section 1699 of the Code of Civil Procedure, or section 1120 of the Probate Code, like other successive proceedings in the probate and execution of a will or the administration of an estate, is a proceeding in rem. Murray v. Superior Court, 207 Cal. 381, 278 P. 1033; King v. Chase, 159 Cal. 420, 425, 115 P. 207; In re Estate of Davis, 136 Cal. 590, 69 P. 412; Smith v. Fidelity & Deposit Co., 130 Cal. App. 45, 55, 19 P.(2d) 1018; Nicholson v. Leatham, 28 Cal. App. 597, 601, 153 P. 965, 155 P. 98; 11 Cal. Jur. 236, 237; 1 Cal. Jur. 324; 11b Cal. Jur. 570; 11a Cal. Jur. 134, 135. The same presumptions as to the validity of its final orders and decrees apply as to judgments and orders of any court of general jurisdiction. Edlund v. Superior Court, 209 Cal. 690, 695, 289 P. 841; Burris v. Kennedy, 108 Cal. 331, 41 P. 458; Tobelman v. Hildebrandt, 72 Cal. 313, 316, 14 P. 20; Wood v. Roach, 125 Cal. App. 631, 639, 14 P.(2d) 170; Fletcher v. Superior Court, 79 Cal. App. 468, 473, 474, 250 P. 195. Therefore a subsequent application in the administration of the same estate to set aside a previous order entered in the course of probate jurisdiction after the same has become final is a collateral attack, and, unless the order is void on its face, it may not on such attack be set aside. In re Estate of Davis, 151 Cal. 318, 86 P. 183, 90 P. 711, 121 Am. St. Rep. 105; Luckey v. Superior Court, 209 Cal. 360, 364, 287 P. 450. This applies to orders settling accounts. In re Estate of Grant, 131 Cal. 426, 63 P. 731; In re Estate of Fernandez, 119 Cal. 579, 51 P. 851; In re Estate of Pratt, 119 Cal. 156, 51 P. 47; Moore v. Superior Court, 86 Cal. 495, 25 P. 22. The filing of the petition setting forth the matters required by the Code sections noted vests jurisdiction in the probate court (see In re Estate of Simmons, 168 Cal. 390, 395, 143 P. 697), whether or not the allegations of the matters necessary to vest jurisdiction accord with the actual facts. In re Estate of Strong, 119 Cal. 663, 666, 51 P. 1078; Nicholson v. Leatham, 28 Cal. App. 597, 601, 153 P. 965, 155 P. 98. The situation here presented calls for the same conclusion as in the case of Murray v. Superior Court, 207 Cal. 381, 385, 278 P. 1033, wherein it was held that the omission in the petition for the probate of the will of the names and addresses of the heirs, legatees and devisees, even if known to the petitioner, does not deprive the court of jurisdiction, and that, when the petition is silent as to such names and addresses, they must be deemed by the clerk to be unknown, and he is not required to mail copies of the published notice. The notice required by the sections is constructive notice to every one of the pendency of the proceedings, and a hearing had and order entered pursuant thereto is conclusive upon all parties in interest. Code Civ. Proc. § 1701; Probate Code, § 1123; In re Estate of Leonis, 138 Cal. 194, 200, 71 P. 171; In re Estate of Grant, 131 Cal. 426, 63 P. 731; Moore v. Superior Court, 86 Cal. 495, 25 P. 22; Smith v. Fidelity & Deposit Co., 130 Cal. App. 45, 55, 19 P.(2d) 1018. Absence of a personal notice in such proceeding does not deprive any person in interest of any of his constitutional rights. In re Estate of Bump, 152 Cal. 274, 276, 92 P. 643; In re Estate of Davis, 151 Cal. 318, 86 P. 183, 90 P. 711, 121 Am. St. Rep. 105; In re Estate of Davis, 136 Cal. 590, 69 P. 412.

[11] Inasmuch as the judgment roll in each of the nine proceedings discloses that all of the requirements of the sections were complied with, and that the court issuing the orders of approval in each case had jurisdiction to make the order, it must be concluded that each thereof was valid and that the respondent court was without jurisdiction to vacate any of said orders.

[12, 13] The respondents urge that, because of the undisputed facts, the orders settling the accounts must be declared void under the rule stated or applied in such cases as Lake v. Bonynge, 161 Cal. 120, 133, 118 P. 535, 540; People v. Harrison, 107 Cal. 541, 546, 40 P. 956; and Hill v. City Cab., etc., Co., 79 Cal. 188, 21 P. 728. The rule invoked, viz., that a judgment otherwise valid on its face may be declared void on a collateral attack where lack of jurisdiction of the party is admitted, presupposes, as stated in Lake v. Bonynge, supra, that the party resisting the attack as collateral "admits facts which show that a service of summons, constructive or personal, was not made on the defendant to the judgment, and allows evidence to be introduced without objection showing this fact." This

is the substantial equivalent of saying that, if the party resisting the collateral attack in effect admits that the judgment, although valid on its face, is nevertheless void because of lack of jurisdiction of the defendant, the court must declare the invalidity in accordance with the admission. Such an admission is not revealed by the record on this proceeding. In fact, the record is to the contrary. The decree of distribution and the record thereon, showing the name and address of W. R. Thomas, and relied on by him, were not admitted in evidence without objection on the part of the petitioner. Furthermore, there is nowhere in the record any evidence, whether objected to or not, that the steps required by the applicable Code sections were not followed to the full extent necessary to give the court jurisdiction to make the orders attempted to be vacated. The effect of the decisions hereinbefore cited is to compel the conclusion that the steps admittedly taken are in accordance with the statute and constituted constructive notice to Thomas, and that no other jurisdictional notice was required.

[14-16] Finally, the respondents contend that the motion to vacate the orders may be considered as addressed to the equity powers of the probate court, and that the respondent court had jurisdiction to set aside said orders on the ground that extrinsic fraud had been practiced in said proceedings. The probate court has no general equity jurisdiction. Its general jurisdiction is confined to the settlement of the estates of deceased persons. Burris v. Kennedy, 108 Cal. 331, 41 P. 458; In re Estate of Hubbell, 121 Cal. App. 38, 8 P.(2d) 530; Parkman v. Superior Court, 77 Cal. App. 321, 246 P. 334. It has the power, however, to apply equitable and legal principles in aid of its functions as a probate court. 11a Cal. Jur. 92, 93, and cases cited. See In re Estate of Eilert, 131 Cal. App. 409, 21 P.(2d) 630. Consequently on a collateral attack the probate court is not vested with power to avoid its own orders or decrees which have become final on the ground that extrinsic fraud has been practiced in obtaining the order or decree. Such power is appropriately vested in a court having general equity jurisdiction. In re Estate of Davis, 151 Cal. 318, 86 P. 183, 90 P. 711, 121 Am. St. Rep. 105; Nicholson v. Leatham, 28 Cal. App. 597, 153 P. 965, 155 P. 98. See, also, Aldrich v. Barton, 138 Cal. 220, 71 P. 169, 94 Am. St. Rep. 43. The decision in the case of In re Estate of Eilert, supra, is not to the contrary. There the probate court did not vacate or set aside any previous order made by it, but merely exercised its equity powers in aid of its probate jurisdiction. The language used in that decision, to the effect that the court, in the exercise of its equity jurisdiction, has the power in a proper case to grant relief from a final order or judgment obtained through fraud or mistake, citing supporting cases, must be deemed, as those cited cases disclose, to refer to the relief which may be afforded by a court of equity. The decision in that case went no further than to approve the exercise of the equity powers of the probate court in instructing the trustee to commence appropriate proceedings or actions for equitable relief, presumably in accordance with the foregoing statement and supporting cases, and in conserving the assets then subject to its probate jurisdiction for the benefit of the persons entitled thereto, which, in the last analysis, is the appropriate function of the probate court.

The order is annulled.

We concur: WASTE, C. J.; SEAWELL, J.; SPENCE, Justice pro tem.; LANGDON, J.; PRESTON, J.

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1 Cal.2d 711

In re McCONNELL'S ESTATE.

McCONNELL v. BIBLE INSTITUTE OF LOS ANGELES et al.

L. A. 14748.

Supreme Court of California.
Oct. 31, 1934.

Rehearing Granted Dec. 3, 1934.

Appeal and error 🔑766

Appeal would not be dismissed on ground that appellant failed to comply with provisions of Code and Supreme Court rules, where appellant's opening brief disclosed satisfactory compliance with Code and court rules (Code Civ. Proc. § 953c; Supreme Court Rules, rules 5, 8).

In Bank.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

In the matter of the Estate of Lee A. McConnell, deceased. From an order approving a corrected account of the Security-First National Bank of Los Angeles, as special administrator of the estate of Lee A. McConnell, deceased, wherein claim of the Bible Institute of Los Angeles was allowed, Frankie A. McConnell appeals, and claimant moves to dismiss the appeal and to affirm the judgment.

Motion to affirm judgment denied, and motion to dismiss denied.

Meserve, Mumper, Hughes & Robertson and Wm. Larrabee, all of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for appellant.

Newby & Newby, Nathan Newby, Jones, Stephenson, Palmer & Moore, and Walter F. Haas, all of Los Angeles, for respondent.

PER CURIAM.

The respondent Bible Institute of Los Angeles moved to dismiss the appeal of the appellant, surviving widow of the decedent, from an order approving a corrected account current of the special administrator, on the ground that she had failed to comply with the provisions of section 953c of the Code of Civil Procedure, and rules V and VIII of this court. At the same time the respondent moved to affirm the judgment on the ground that the appellant is not a party aggrieved by the order. On the hearing the motion to affirm was denied.

As to the motion to dismiss, an examination of the appellant's opening brief discloses a satisfactory compliance with the Code section and the rules of court. The motion to dismiss is denied.

1 Cal.2d 706

KLEIN v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 15120.

Supreme Court of California.

Oct. 30, 1934.

1. Constitutional law 🔑190

Schools and school districts 🔑133

Any tenure acquired by school teacher was vested right which remained unaffected by repeal of statute relating thereto (Pol. Code, § 1793; School Code [preliminary provisions] § 5).

2. Mandamus 🔑79

Schools and school districts 🔑133

Arbitrary reduction of school teacher's status from vice principal to teacher, with consequent reduction in compensation, after ten years' service as vice principal teacher, violated her right of tenure, and mandamus will require restoration, as against contention that she was not reduced in "grade" because of her retention as a teacher (Pol. Code, § 1609, as amended by St. 1921, p. 1663; St. 1931, p. 3057, § 135; Pol. Code, § 1793; School Code [preliminary provisions] § 5).

[Ed. Note.—For other definitions of "Grade," see Words & Phrases.]

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Proceeding for writ of mandate by Marie G. Klein against the Board of Education of the City and County of San Francisco and others. From an adverse judgment, defendants appeal.

Affirmed.

Prior opinion, 28 P.(2d) 402.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco (Irving G. Breyer, of San Francisco, of counsel), for appellants.

Francis W. Murphy, of San Francisco, for respondent.

WASTE, Chief Justice.

The board of education of the city and county of San Francisco, and its constituent members, appeal from a judgment directing the issuance of a peremptory writ of mandate commanding them to restore respondent to her position and status as a permanent vice principal teacher in the elementary schools of said city and county.

In October, 1904, respondent, having served her probationary period of two years, was elected a permanent teacher in such schools, without limitation as to time. Thereafter, and on August 16, 1921, after two years' probationary service, she was elected vice principal in such schools, without limitation as to time. The resolution covering the latter appointment declared that the persons therein named, among whom was respondent, "having served their probationary periods as vice-principals in a manner satisfactory to their principals, to the office of the Superintendent of Schools and to the Schools Committee, be and they are hereby elected regular vice-principals in the elementary schools of this Department." Respondent was thereafter for ten years continuously employed as a vice principal teacher in various elementary schools to which she was assigned, and as such performed the supervisory and administrative functions of a vice principal and taught classes daily. On August 11, 1931, the appellant board dismissed her as a vice principal but retained her as a teacher. Such action was not taken for any cause for which the law authorized the board to dismiss the holder of a permanent tenure.

[1, 2] Respondent's tenure as vice principal, but not as a teacher, is here involved. The question for decision is whether respondent had previously acquired a tenure which prevented her dismissal except for cause.

Respondent contends that the former section 1793 of the Political Code, in effect at the time of her election as vice principal, gave her such tenure. In support thereof she relies mainly on Kennedy v. Board of Education, 82 Cal. 483, 22 P. 1042, 1044, construing said section. The appellants deny that a vice principalship is a position to which the state law attaches any permanency of tenure, and contend that, having been retained as a teacher in the elementary schools, respondent has not been reduced in "grade" within the meaning of the Kennedy Case, supra.

At the time of respondent's election as a vice principal teacher on August 16, 1921, subdivision 1 of section 1793 of the Political Code provided that the "holders of city, or city and county, certificates are eligible to teach in cities, or cities and counties, in which such certificates were granted, in schools or classes of grades corresponding to the grades of such certificates, and when elected shall be dismissed only for insubordination or other causes, as mentioned in section seventeen hundred and ninety-one of this code, duly ascertained and approved by the boards of education of such cities, or cities and counties." The language of this subdivision has remained substantially the same from its enactment in 1881 to its repeal by the School Code of 1929 (St. 1929, p. 303, § 10.3). Anderson v. Board of Education, 126 Cal. App. 514, 516, 15 P.(2d) 774, 16 P.(2d) 272. Of course, any tenure previously acquired by respondent was a vested right and remained unaffected by such repeal. Gastineau v. Meyer, 131 Cal. App. 611, 22 P.(2d) 31. In fact, section 5 of the preliminary provisions of the 1929 School Code (St. 1929, p. 1) recognized and continued previously acquired tenure.

In the Kennedy Case, supra, relied on by respondent, this court had occasion to interpret the provisions of section 1793, supra, set forth above, and it was therein held that they granted tenure after election, without time limitation, to a principal teacher of the San Francisco elementary schools. In that case the petitioner had been removed without cause from her position as principal teacher of the North Cosmopolitan Grammar School and assigned to the position of principal teacher of Ocean View School, a school of lower grade, and at a reduced salary. In the course of its decision, this court preliminarily declared that section 1617 of the Political Code conferred on city boards of education, as distinguished from boards of trustees of school districts, unlimited power to employ teachers, and that, inasmuch as the petitioner therein had been "elected precisely as provided in this section [1793, supra], without limitation as to time. * * * The power of the board of education to remove her is expressly and plainly limited * * * for the causes named in the section."

This decision was followed under similar facts in Fairchild v. Board of Education, 107 Cal. 92, 40 P. 26, and was approved in Barthel v. Board of Education, 153 Cal. 376, 95 P. 892. We think its reasoning and conclusion is determinative of the present proceeding.

Apparently in view of the fact that the provisions of section 1793, supra, as construed in the Kennedy Case, related and granted tenure only to those who held "city, or city and county" certificates, a state-wide teachers' tenure was provided in 1921 (Stats. 1921, p. 1663) by amendment to section 1609 of the Political Code, into which the former section 1617, supra, was transposed. This amendment to section 1609 became effective fourteen days prior to respondent's election as a vice principal teacher. We find nothing in its provisions nor in the case of Bland v. Board of Trustees, 67 Cal. App. 784, 228 P. 395, construing the same so as to preclude a principal from acquiring tenure and permitting dismissal of such principal arbitrarily after the expiration of the term for which he was elected, that in any way affects the ultimate disposition of the present proceeding. It is declared in the last-cited case that the amended section 1609, supra, evidences "an intent on the part of the legislature to draw a distinction between a principal of a school and a principal teacher." As stated in Anderson v. Board of Education, supra, 126 Cal. App. 516, 15 P.(2d) 774, 16 P.(2d) 272, the decision in the Bland Case, just above referred to, held that the 1921 amendment to section 1609 "did not grant full tenure to a principal who was not a 'teaching principal' as such principals [under the amended section 1609] could be elected for a definite period only." A vice principal is, for all material purposes, an assistant principal, having the same right of tenure as a principal, and therefore, if the amended section 1609 makes a distinction between a principal and a teaching principal, the same distinction should exist in favor of a vice principal teacher, in the absence of a contrary intent expressed in the statute.

Moreover, in the Bland Case, supra, wherein a general demurrer to the petition was sustained without leave to amend, there was no allegation as to the period of time for which the petitioner therein had been elected, nor did it appear that he had been engaged as a teacher or principal teacher. It should also be pointed out that the petitioner in that case had been appointed by a board of school trustees of a school district and not by a city board of education. He could not therefore rely on section 1793, supra, construed in the Kennedy Case, above cited, for said section applied only to the holders of city certificates.

At the time of the arbitrary demotion of the respondent herein, she had been serving for approximately ten years as vice principal *teacher* of elementary schools in the city and county of San Francisco. To so arbitrarily reduce her status from that of vice principal to that of teacher, with a consequent reduction in compensation, served to violate and destroy her right of tenure as such vice principal teacher. We cannot accept appellants' conclusion that respondent was not reduced in "grade" because of her retention as a teacher in the elementary schools. In Cullen v. Board of Education, 126 Cal. App. 510, 15 P.(2d) 227, 228, 16 P.(2d) 272, wherein we denied a hearing, it is held that "this right of tenure is a right which the teacher enjoys to continue in the position or positions to which he has become elected under the statute—i. e., in a position or positions of a *rank* and *grade* equivalent to that occupied for the probationary period and to which the teacher has thus become 'elected' under the statute." (Italics added.) To the same effect see Anderson v. Board of Education, supra, 126 Cal. App. 521, 15 P.(2d) 774, 776, 16 P.(2d) 272, wherein it is declared that "the tenure, therefore, runs to a position of employment, *or service*, of equal grade *and rank* to that to which the statutory classification has applied, and such is the settled rule of the Kennedy Case."

Our conclusion herein is consonant with the provisions of section 135 of the recently enacted charter of the city and county of San Francisco (Stats. 1931, pp. 2973, 3057), effective subsequent to respondent's demotion, which now extends permanent tenure to "all teachers, * * * vice-principals, principals, * * * after they have been successfully employed in such positions in the school department for a probationary period of three years."

The judgment is affirmed.

We concur: LANGDON, J.; PRESTON, J.; SPENCE, Justice pro tem.; SHENK, J.; IRA F. THOMPSON, J.; SEAWELL, J.

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1 Cal.2d 724

In re RALSTON'S ESTATE.

RALSTON et al. v. KAGARISE.

L. A. 14725.

Supreme Court of California.

Nov. 1, 1934.

Rehearing Denied Nov. 30, 1934.

1. Trusts 🔑21(2), 25(1)

To create valid trust, it is necessary that language employed definitely indicate intention to create trust and that subject-matter and persons intended to have benefit be certain.

2. Wills 🔑671

Testator's gift of all his property in trust to executor with absolute power of disposition did not create valid trust because of failure to indicate either object of trust or persons to benefit thereby.

3. Wills 🔑671, 849

Will creating trust of all testator's property to be disposed of by donee as he saw fit which named no beneficiaries showed intent to create trust void for uncertainty, and hence property passed under laws of intestate succession, in absence of residuary clause.

SPENCE, Justice pro tem., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Thos. P. White, Judge.

Proceeding in the matter of the estate of W. H. H. Ralston, deceased, in which William

James Ralston and another filed a petition for participation in the named estate, opposed by L. R. Kagarise, individually and as executor of the estate of W. H. H. Ralston, deceased. From an adverse decree, the named petitioner appeals.

Reversed, with directions.

Rehearing denied; PRESTON, J., dissenting.

Edwin J. Miller, Ralph W. Miller, and Samuel H. Peck, Jr., all of Los Angeles, for appellant.

Libby & Sherwin, of Los Angeles, for respondents.

WASTE, Chief Justice.

This is an appeal from a decree entered in a proceeding to determine heirship.

The decedent died testate in Los Angeles county, leaving as his next of kin and heirs at law two grandsons. The pertinent provisions of his will, of which the respondent is the duly appointed and acting executor, read as follows:

"I give and bequeath in trust to L. R. Kagarise * * * my entire property at my death, both Real and Personal, wherever this property may be situated, and I hereby give and bequeath to the said L. R. Kagarise absolute authority to dispose of this my entire estate as he may see fit. * * *

"I appoint the said L. R. Kagarise as my executor and administrator of my estate as he has always been my good friend, and I have absolute confidence in his honesty, and will do as well in disposing of my estate as I could if I were still alive."

The will contained no residuary clause.

Contending that the trust attempted to be created by the decedent is invalid and void for uncertainty, and that the decedent's estate therefore passed to them in equal shares as his next of kin and only heirs at law, the two grandsons commenced this proceeding. On behalf of the petitioner Hamer it was also urged that, whether the trust be valid or invalid, he is entitled to one-half of the property as a pretermitted heir. The appellant, Ralston, being mentioned elsewhere in the will, could not advance this claim.

After hearing, the court below found that the will of decedent "does not create a trust but does by its terms give the entire estate" to the respondent executor. It was also found that the petitioner Hamer upon distribution of the estate is entitled to one-half thereof as a pretermitted heir. A decree was accordingly entered from which the petitioner, Ralston, who was refused any participation in the estate, prosecuted this appeal on the judgment roll alone.

[1, 2] We agree with the lower court in so far as it found and concluded that the will failed to impress a trust upon the decedent's property. It is essential to the validity of a trust, whether express or precatory, that the language employed definitely indicate an intention to create a trust, that the subject-matter thereof be certain, and that the object or persons intended to have the benefit thereof be certain. The authorities are legion to this effect. The "trust" here involved is defective and invalid because of its complete failure to indicate either the object or the persons to benefit thereby.

[3] We cannot, however, accept the further finding and conclusion that the will "by its terms gives the entire estate" to the respondent executor. The instrument does not purport to vest the property in respondent executor for his own individual use. On the contrary, it declares that the property is left to the respondent "in trust." In view of this expressed intention, the property, because of the invalidity of the trust, passes under the laws of intestate succession, and the two grandsons of the decedent, as his next of kin and only heirs at law, are entitled to share equally therein. Wittfield v. Forster, 124 Cal. 418, 420, 57 P. 219.

There is a well-recognized distinction between an uncertainty where the intent to establish a trust is clear but the provisions are so indefinite as to render the trust void for uncertainty, and the uncertainty which simply indicates the want of intention to create a trust. Loomis Inst. v. Healy, 98 Conn. 102, 119 A. 31. This distinction is discussed in Pratt v. Trustees of Sheppard & E. P. Hospital, 88 Md. 610, 42 A. 51, 56, wherein the following appears: "But it must be borne in mind that there is a distinction between a trust that is void for uncertainty, and an uncertainty that is simply indicative of the absence of an intention to create a trust. In the one case there is no uncertainty as to the intention to create a trust, but merely an uncertainty as to the objects to be benefited or the subject to be affected; in the other case, there is simply an uncertainty as to whether any trust was intended to be created at all. If it be uncertain as to whether there was an intention to create a trust, it is obviously not the province of the courts to ingraft a trust upon the gift; but, if it be apparent from the whole will that a trust was intended to be established, then the uncertainty as to the objects or the subject of that trust will not indicate that there was no intention to raise a trust, but the uncertainty will avoid the trust attempted to be founded. Where the expressions have been held too vague to show an intention to create a trust, the devisee or legatee retains the property for his own use; but where the intention to create a trust is sufficiently expressed, and yet the objects or the subjects of it are uncertain, the gift fails, and the heir or next of kin is let in to the beneficial ownership."

In Briggs v. Penny, 42 Eng. Reprint, 371, 375, it is declared: "Once established that a trust was intended, and the legatee cannot take beneficially. If a testator gives upon trust, though he never adds a syllable to denote the objects of that trust, or though he declares the trust in such a way as not to exhaust the property, or though he declares it imperfectly, or though the trusts are illegal, still in all these cases, as is well known, the legatee is excluded, and the next of kin take."

The case of Maught v. Getzendanner, 65 Md. 527, 5 A. 471, 57 Am. Rep. 352, reviews the authorities on the issue here presented.

In the instant case there can be no doubt as to the testator's intent to create a trust. As already stated, he expressly declared that he left his "entire property" to the respondent executor "in trust." His failure to designate with sufficient certainty the objects or purposes of the trust makes the same invalid and unenforceable. However, his intent being clear that the respondent executor was not to acquire a beneficial interest in the property, it passed upon his death, and, in the absence of a residuary clause in the will, to his next of kin and heirs at law, the petitioners in this proceeding, in equal parts under the laws of intestate succession.

The decree is reversed, in so far as it precludes the appellant from participating in the estate of the decedent, with directions to the court below to proceed as herein indicated.

We concur: CURTIS, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

SPENCE, Justice pro tem.

I dissent.

The fact that the testator used the words "in trust" is not necessarily determinative of an intention upon his part to create a trust, but such intention must be ascertained by a reading of the entire will. In re Dever's Will, 173 Wis. 208, 180 N. W. 839, 840; Danforth v. Oshkosh, 119 Wis. 262, 97 N. W. 258; Norman v. Prince, 40 R. I. 402, 101 A. 126. In the case first above cited it is declared:

"In construing a will, the constant effort of courts is to ascertain and give effect to the intention of the testator. The phrase 'in trust,' or 'upon trust,' has a well-settled technical meaning, and when used advisedly in a will, in connection with a devise or bequest, affords rather plain evidence of the intention of the testator. This, we say, is the result where the words have been used advisedly. As was said of this, or a similar, phrase in Davies v. Davies, 109 Wis. 129, at page 133, 85 N. W. 201, at page 203: 'Had these words been used by a trained lawyer, the argument that they must receive their true technical meaning would be strong; but here the fact that they were used by a layman, albeit an educated man, is of great importance. The word "trust," in its popular sense, covers many things besides the legal and technical trust.'

"In Danforth v. Oshkosh, 119 Wis. 262, at page 276, 97 N. W. 258, at page 263, it is said: 'Of course, the presence or absence of words declaring an estate to be in trust is not conclusive, though they may be more or less significant of the purpose in the grantor's mind. * * * The question is whether the testator's intent involved the elements of a trust as known to the law.'

"These expressions sufficiently indicate that this court has not considered the use of these words as conclusive of the intention of the testator, and has not felt precluded from making further inquiry concerning such intention, merely because the phrase 'in trust' or 'upon trust' is used in connection with a devise or bequest contained in a will. We are also impressed with the thought that where a testator says he gives 'in trust' or 'upon trust,' but makes no attempt to prescribe the terms or purposes of the trust, a court may well pause and consider whether it was really the intention of the testator to create a trust in the legal sense. When the phrase 'in trust,' or 'upon trust,' is used advisedly, he who uses it understands that the terms and conditions of the trust must be defined with definiteness and certainty. When a testator says he gives 'in trust,' and says no more, the query most naturally arises as to whether the phrase was inserted for the purpose of creating a trust in the true legal sense. We think such a situation gives rise to an ambiguity, and the court may summon to its aid all legitimate considerations that will enable it to determine the intent of the testator with reference to the disposition of the residue of his estate. * * *

"We think the phrase 'in trust' was used by the testator, not in its technical and legal but in its popular, sense, and that in the connection in which it was thus used it was intended to be expressive of the trust and confidence which the testator reposed in his lifelong friends and associates, and that it was his intention that they should take the residue of the estate, to use or dispose of as they might see fit. A gift of this kind carries with it absolute ownership. * * *"

Construing the will in the instant case in the light of the foregoing authorities, I believe that the court below correctly determined that the instrument failed to impress a trust upon the property, but rather disclosed an intention to make an absolute gift to Kagarise, with "absolute authority" in him to dispose of the property "as he may see fit." In view of the total absence of any language attempting to name a trust beneficiary or to specify a trust purpose, and of the evident intention to make an absolute gift to Kagarise, it must be concluded that the testator did not employ the words "in trust" in their technical sense. Moreover, even if it be conceded for present purposes that there is some uncertainty as to the testator's intention, the will should be so construed as to validate, rather than invalidate, its main provisions (Civ. Code, § 3541) with resulting intestacy. The construction given to the will by the court below achieves this purpose.

In my opinion, the decree should be affirmed.

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1 Cal.2d 722

GAFFIGAN v. LAWTON et al.

S. F. 15125.

Supreme Court of California.

Nov. 1, 1934.

1. Limitation of actions 🔑24(2)

Although labor and material were furnished to contractor under oral contract, contractor's obligation was evidenced by written contract where he, as well as surety, signed bond; hence obligation was subject to four-year, and not two-year, statute of limitations (Code Civ. Proc. §§ 337, 339).

2. Limitation of actions 🔑167(1)

Even if action for labor and material furnished under oral contract was barred as to contractor by two-year statute of limitations, contractor's surety was not discharged from liability on written bond, where four-year statute of limitations had not run when action was commenced (Code Civ. Proc. §§ 337, 339; Civ. Code §§ 2825, 2840).

In Bank.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by J. A. Gaffigan, doing business under the fictitious name of the Gaffigan Sheet Metal Works, against Frederick H. Lawton, also known as Frederick Lawton and F. H. Lawton, and the National Surety Company of New York. From a judgment for the last-named defendant after an order sustaining a demurrer without leave to amend, plaintiff appeals. During the pendency of the appeal, the defendant corporation was dissolved, and George S. Van Schaick, as Superintendent of Insurance of New York, was substituted as a defendant.

Judgment reversed.

Prior opinion, 28 P.(2d) 375.

J. W. Coleberd, of South San Francisco, for appellant.

R. P. Wisecarver, of San Francisco, for respondent.

PER CURIAM.

This is an action against a contractor and his surety to recover for labor and materials furnished for the erection of a building. The defendant National Surety Company was served, and set up the defense of the statute of limitations by demurrer. The lower court sustained the demurrer without leave to amend, and plaintiff appealed. While the appeal was pending, the defendant corporation was dissolved by decree of the Supreme Court of New York, and George S. Van Schaick, as superintendent of insurance of said state, was substituted as a defendant.

[1, 2] The lower court proceeded upon the theory that the contract of plaintiff with the contractor was oral, the contractor agreeing to pay upon completion of the building, and the action was brought more than two years thereafter; that therefore the action against the contractor was barred by the statute (Cal. Code Civ. Proc., § 339); and that liability of the surety, being collateral, was discharged when the principal debt was so barred.

This view is untenable for several reasons. First, the bond itself was executed not only by the surety but by the contractor who was the principal, and it would follow that the latter's obligation was evidenced by a written contract, and hence subject to the four-year statute of limitations (Cal. Code Civ. Proc. § 337), which had not run when the action was commenced. Second, our Civil Code provides that a guarantor "is not exonerated by the discharge of his principal by operation of law, without the intervention or omission of the creditor" (Cal. Civ. Code, § 2825); and that a surety is exonerated "in like manner with a guarantor" (Cal. Civ. Code, § 2840). Third, although there is conflict in the authorities, the more reasonable and logical rule, supported by a number of cases, is that the obligation of the surety remains, notwithstanding the fact that the statute of limitations has run on the obligation of the principal. Willis v. Chowning, 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 842; Arant on Suretyship, pp. 181, 313; Spencer on Suretyship, p. 285; Stearns on Suretyship (3d Ed.) p. 132. The rule was followed in this state in the early case of Whiting v. Clark, 17 Cal. 407, and subsequently approved in Bull v. Coe, 77 Cal. 54, 60, 18 P. 808, 11 Am. St. Rep. 235. The same principle is involved, and the same result is reached, where the creditor fails to present his claim against the estate of a deceased principal. The surety is not discharged. Bull v. Coe, supra; Duerr v. Sloan, 50 Cal. App. 512, 195 P. 475; Yerxa v. Ruthruff, 19 N. D. 13, 120 N. W. 758, 25 L. R. A. (N. S.) 139, Ann. Cas. 1912D, 809; Arant on Suretyship, p. 313. The case of Towle v. Sweeney, 2 Cal. App. 29, 83 P. 74, is in conflict with the principles established in the foregoing decisions, and must be disapproved.

The judgment is reversed.

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1 Cal.2d 675

In re BANK OF SAN PEDRO.

RAINEY, State Superintendent of Banks, et al. v. SULENTOR et al. (VAN CAMP SEA FOOD CO., Inc., et al., Interveners).

L. A. 14808.

Supreme Court of California.
Oct. 22, 1934.

Rehearing Denied Nov. 19, 1934.

1. Banks and banking 🔑63½

Private sale of assets of insolvent bank can be made by state superintendent of banks and conservator, and confirmed by superior court, on sufficient notice and hearing of objections, where evidence is sufficient to support court's finding in favor of sale (St. 1933, p. 319, § 135c; St. 1929, p. 471, § 136; St. 1913, p. 198, § 136b).

2. Banks and banking 🔑63½

Evidence *held* to support findings confirming private sale of assets of insolvent bank by state superintendent of banks and conservator (St. 1933, p. 319, § 135c; St. 1929, p. 471, § 136; St. 1913, p. 198, § 136b).

3. Appeal and error 🔑83

Decree confirming sale of assets of insolvent bank by state superintendent of banks and conservator *held* not merely ministerial act, but one made in exercise of judicial function, and subject to appeal as "final decree" in special proceeding of civil nature (St. 1933, p. 319, § 135c; St. 1929, p. 471, § 136; St. 1913, p. 198, § 136b).

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Petition by Edward Rainey, State Superintendent of Banks, and Henry E. Sherer, conservator of the Bank of San Pedro, for confirmation of a sale of assets of the Bank of San Pedro, opposed by John Sulentor and others, copartners doing business as the Standard Fisheries Company, and another, for and on behalf of themselves and all other depositors and creditors, wherein the Van Camp Sea Food Company, Inc., and another intervene. From a decree ratifying, approving, and confirming the sale, named objectors appeal, and respondents move to dismiss the appeal.

Motion to dismiss appeal denied; decree affirmed.

H. A. I. Wolch, of Los Angeles, for appellants.

Sullivan, Roche, Johnson & Barry and Henry H. Childress, all of San Francisco, and L. F. Bernhard, of Los Angeles, for respondents.

SHENK, Justice.

Acting under the authority of section 135c, added to the Bank Act (St. 1909, p. 87) in 1933 (Stats. 1933, pp. 318, 319), the superintendent of banks appointed Henry E. Sherer as conservator of the Bank of San Pedro. Subsequently the conservator sold certain assets of the Bank of San Pedro to Bank of

America National Trust & Savings Association for the sum of $1,047,330.60. Thereafter the superintendent of banks and the conservator filed in the superior court their return and petition for confirmation of the sale. Objections to the confirmation were filed by the appellants, a copartnership doing business as Standard Fisheries Company, and Louise A. Steele, for and on behalf of themselves and all other depositors and creditors of the San Pedro Bank. The Van Camp Sea Food Company, Inc., a large depositor, filed a document called "intervention," praying that the sale be confirmed. The matter came on regularly before the court and after a full hearing the court found and concluded that the sale had been fairly made and legally conducted; that the price was not disproportionate to the value of the property sold; that a better price or better terms for all of said assets could not be obtained; and that it would be and is for the benefit, advantage, and best interest of the Bank of San Pedro, its depositors and creditors, that said property be sold as one parcel for the price and upon the terms stated in the offer of Bank of America National Trust & Savings Association; that the objections interposed against the sale were not well founded; and that the sale be confirmed. A decree ratifying, approving, and confirming the sale was accordingly entered.

On this appeal, prosecuted by the members of the firm called Standard Fisheries Company, it is contended (1) that the superintendent of banks has no authority under the statute to sell at private sale any of the assets of a bank taken over by him under the Bank Act; (2) that the superior court is without jurisdiction to affirm such a sale; and (3) that the sale made and approved herein was and is unfair and unjust to the depositors and other creditors.

The first two contentions would seem to be answered by section 136 (St. 1909, p. 115, as amended by St. 1929, p. 471), section 136b (St. 1909, p. 87, as added by St. 1913, p. 198), and section 135c of the Bank Act. Section 136 authorizes the superintendent of banks to take possession of the property and business of a state bank under the conditions specified in the act. No claim is made that the conditions did not exist in the case of the Bank of San Pedro. Said section also provides that in the process of liquidation "the superintendent of banks may sell any real or personal property of such bank on such terms as the court shall direct or approve." Section 136b provides that, "in any action or proceeding brought under any provision of this act, exclusive original jurisdiction shall be vested in the superior court of the county in which is located the principal place of business of the bank affected thereby," with further provisions as to what shall be included in the record of the action or proceeding, and that the same shall be tried and determined in accordance with the provisions of the Code of Civil Procedure. Section 135c provides that: "The conservator under the direction of the Superintendent of Banks shall take possession of the books, records and assets of every description of such bank. * * * Such conservator shall have all the rights, powers and privileges now possessed by or hereafter given the Superintendent of Banks, with relation to banks of which he has taken charge under the provisions of section 136 of this act. * * *"

[1] The foregoing provisions of the Bank Act constitute ample authority for the action taken by the superintendent of banks, the conservator, and the trial court in the present matter, unless it must be said that a private sale of any of the assets of the bank could not be made or approved. The nature of the business of winding up the affairs of a bank under the act or of conserving its assets and business with the view of possible reorganization and continuance in business is such that to prevent a private sale of any of the assets of the bank might greatly impede, delay, and embarrass the statutory officers in the process of liquidation or conservation, to the detriment of all concerned. The requirement of a confirmation of the sale by the superior court was doubtless deemed a sufficient safeguard against unfair, arbitrary, or improvident action on the part of the superintendent of banks and the conservator, and we cannot say that it is not legally adequate for that purpose. When, as here, sufficient notice was given to afford all who might object to the sale an opportunity to be heard in court and such hearing was had, the requirements of the law are met, provided the evidence is sufficient to support the findings of the court.

[2] On the hearing it appeared that efforts had been made by the conservator, who had been president of the Bank of San Pedro and a member of the board of directors for many years, to obtain a loan from the Reconstruction Finance Corporation to enable the bank to reorganize and continue in business, but without success; that the sale of the particular assets involved herein would enable the conservator, under the supervision of the superintendent of banks, to distribute at

once about 70 per cent. to the commercial depositors and about 33 per cent. to the depositors in the savings department; that by the retention of the balance of the assets the prospect was good to obtain a loan thereon or other disposition thereof which would be advantageous; that the price to be paid for the particular assets involved in this proceeding in one parcel was not disproportionate to the value thereof; that a better price for the whole thereof or on better terms could not be obtained; and that the sale would be for the benefit, advantage, and best interest of said bank, its depositors and creditors.

The evidence introduced by the objectors on the claim of unfairness of price is insubstantial. It consists generally of conclusions of witnesses and the testimony of a representative of a bond and brokerage concern that his principals would pay $25,000 more for certain of the assets set forth in the schedule than the noted sale price therefor. The items referred to describe securities whose value was stable or had appreciated since the offer to purchase was made. On the other hand, there were items whose value had depreciated since the offer and other items whose value was either uncertain or speculative. This evidence merely created a conflict which the trial court resolved in favor of the petitioners, the respondents herein.

It was insisted at the hearing by some of the objectors that certain terms of the sale are inequitable and that the better course would have been to proceed with a liquidation in accordance with the terms of the Bank Act as they existed prior to the amendments and additions of 1933, and not through the appointment of a conservator, and the sale involved herein. These objections presented points in the controversy which the court was called upon to decide, having in mind the powers and duties of the superintendent of banks and the conservator under the statute and the rights of the parties affected. No good reason has been advanced which would compel a contrary conclusion on this appeal. The findings are supported by the evidence.

[3] The respondents moved for a dismissal of the appeal on the ground that the decree in confirmation is not made in the exercise of a judicial function, but is merely a ministerial act, and that in any event the decree of the trial court is final and no appeal therefrom will lie. The motion is not well grounded. The court proceeding is no merely formal approval of the action of the officials under the Bank Act. The court's function is to safeguard the rights of the parties whose interests are involved in the proceeding before it. It is given exclusive original jurisdiction of the proceeding as a court. The right of appeal is not denied by the act. The proceeding is a special proceeding of a civil nature, and the right of appeal from a final decree therein is accorded by section 963 of the Code of Civil Procedure. See People v. Bank of San Luis Obispo, 152 Cal. 261, 92 P 481.

The motion to dismiss the appeal is denied. The decree is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.

1 Cal.2d 703

NEARY v. PETERSON et al.

L. A. 13306.

Supreme Court of California.
Oct. 30, 1934.

Taxation 🔑509

Lien of street improvement bond was on a parity with prior lien for taxes due state and was not destroyed by execution of tax deed, whether under statute in force when assessment underlying tax deed became lien or under statute in force when deed to purchaser of tax title was issued, by both of which tax deed conveyed title free of all incumbrances except lien for taxes levied for municipal purposes, term lien for "taxes levied" including lien for special assessments (Pol. Code, §§ 3771a, 3787; St. 1911, p. 730, as amended).

[Ed. Note.—For other definitions of "Tax; Taxation," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by J. J. Neary against Carrie W Peterson, G. M. Brown and another. From a judgment in favor of G. M. Brown, the plaintiff appeals.

Reversed.

Prior opinion, 30 P.(2d) 55.

Horace L. Cook, of Los Angeles, for appellant.

R. Dechter and Wendell MacKay, both of Los Angeles, for respondent G. M. Brown.

J. Everett Brown, of Los Angeles, for respondent Grace P. Warden.

Solon S. Kipp, of San Diego, amicus curiæ.

PRESTON, Justice.

This appeal involves the title to a lot located in Culver City, Los Angeles county. The question presented is that of the priority of a lien for general taxes over a subsequent lien for street improvement assessments upon the property. After a careful consideration of the cause, we are in accord with the conclusion announced by the District Court of Appeal, First Appellate District, Division 1, speaking through Mr. Justice pro tem. Jamison.

Plaintiff, on November 7, 1928, brought this action to foreclose the lien of a street improvement bond issued under the Street Improvement Act of April 7, 1911 (St. 1911, p. 730), and acts amendatory thereof, alleging that at the time of issuance of said bond defendant Carrie W. Peterson was the owner of the lot here in question. Respondent Brown, who was served as a defendant by a fictitious name, answered, denying ownership in said Carrie W. Peterson and setting up the claim of ownership in himself by virtue of a tax deed issued to him by the tax collector of Los Angeles county. Defendant Warden, also served under a fictitious name, defaulted, as did likewise said defendant Peterson. Judgment was rendered in favor of defendant Brown. Plaintiff's motion for new trial was denied, and he now prosecutes this appeal.

Appellant's said street improvement bond was issued by said city on September 23, 1927, and thereafter assigned to him. Respondent's tax deed was issued to him on August 5, 1929, by the tax collector of Los Angeles county, based on a lien for state and county taxes for the year 1923. Said lot was, by operation of law, sold to the state on June 30, 1924, but was thereafter duly assessed for taxes for the years 1924, 1925, 1926, 1927, and 1928. It was purchased by respondent at public sale, pursuant to section 3771a of the Political Code, on July 27, 1929, and, on the same day, he redeemed it from the subsequent state and county taxes which had been assessed against it. At the time appellant's street bond became a lien on said property, only the legal title thereto was in the state of California; the equitable title was at all times prior to said sale to respondent in the defendant Carrie W. Peterson.

The question, therefore, is reduced to this: Did the lien for taxes due the state destroy the lien of the improvement bond?

This question, for all practical purposes, was answered by the recent case of La Mesa, etc., Irrigation Dist. v. Hornbeck, 216 Cal. 730, 17 P.(2d) 143, where it was held that by section 3787 of the Political Code the former priority of liens for general taxes was subordinated and they were placed on a parity with certain enumerated liens for special assessments. This disposes of the question before us here, unless it must be held that the lien in this case is without the exceptions set forth in said Code section. A contention has also arisen as to which version of said section is applicable. Are we to consider the statute as it read in 1923, when the assessment underlying the tax deed became a lien, or as it read in 1929, when the deed to the purchaser of the tax title was executed? The two versions, so far as here material, are:

"3787. Such deed * * * is * * * conclusive evidence of the regularity of all other proceedings, from the assessment by the assessor, inclusive, up to the execution of the deed. Such deed conveys to the state the absolute title to the property described therein, free of all encumbrances, except any lien of taxes levied for municipal or irrigation district purposes. * * *" St. 1917, c. 157, p. 241.

"3787. Such deed * * * is * * * conclusive evidence of the regularity of all other proceedings, from the assessment * * * up to the execution of the deed. Such deed conveys to the state the absolute title to the property described therein, free of all encumbrances, except any lien for taxes levied for municipal, or for irrigation, reclamation, protection, flood control, public utility or other district purposes. * * *" St. 1927, p. 1666, c. 830.

As will hereafter appear, an answer to this inquiry is not required. The words "lien for taxes" found in both versions of said section includes liens for special assessments. This is clear from the context, for certain agencies are included which have no taxing power except by way of special assessments.

This record also suggests the question as to whether or not said section does not relate solely to existing and prior liens upon the property at the time the assessment for general taxes became a lien and that all exceptions noted therein simply have the effect of preserving certain existing and prior liens as of said date of assessment; that said section so construed would and could lawfully have no reference to tax liens upon the property accruing subsequent to such assessment for general taxes.

But again we need not pause to answer this query, for we are convinced that said section, whether taken as it read in 1923 or as it read in 1929, was broad enough to apply to the special assessment lien of said Street Improvement Act. This we deduce from a construction of the phrase "municipal * * * purposes" found in the statute in 1923 and the phrase "municipal * * * or other district purposes" found in the section as it read at the time of the sale to respondent.

The liens are therefore on a parity, made so by statute, and the lien for the subsequent street improvement remained intact, notwithstanding the sale to respondent.

The judgment is reversed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; IRA F. THOMPSON, J.

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1 Cal.2d 784

BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY v. STATE BOARD OF EQUALIZATION et al.

S. F. 15186.

Supreme Court of California.
Nov. 2, 1934.

Rehearing Denied Nov. 30, 1934.

1. Intoxicating liquors 🔑59(2)

Sale of intoxicating liquors at pharmacy seven-tenths miles in usual course of travel, but less in straight line, from nearest point on boundary of university campus, and less than 1½ miles in straight line from university administration building on campus, *held* prohibited by statute (Pen. Code, § 172a).

2. Intoxicating liquors 🔑59(2)

Distance of place for sale of intoxicating liquors from university campus must be measured from campus limits by direct and straight line in determining whether it is within distance prohibited by statute (Pen. Code, § 172a).

3. Intoxicating liquors 🔑59(2)

License, granted pharmacy located less than 1½ miles in straight line from university campus, to sell intoxicating liquors, is illegal and must be canceled by state board of equalization (Pen. Code, § 172a).

4. Intoxicating liquors 🔑76

Act simply ministerial in nature and in no sense judicial, such as granting of license by state board of equalization to sell intoxicating liquors, cannot be reached by writ of review (Code Civ. Proc. § 1068).

5. Intoxicating liquors 🔑261

Equity court may close place selling intoxicating liquors within prohibited distance from university campus or prevent such sale on premises by court order and writ of injunction (Pen. Code, § 172a).

6. Certiorari 🔑69

Supreme Court, having all facts before it in proceeding for writ of review of administrative board's action, may give appropriate relief warranted by record, though petition demands wrong relief (Code Civ. Proc. § 1068).

7. Mandamus 🔑87

License, granted by state board of equalization, to sell intoxicating liquors within prohibited distance from university campus, being illegal, Supreme Court will grant writ of mandate, requiring board to cancel license, on university trustees' petition for writ of review, though petition demanded wrong relief (Pen. Code, § 172a; Code Civ. Proc. § 1068; Const. art. 6, § 4).

In Bank.

Proceeding by the Board of Trustees of the Leland Stanford Junior University for a writ of review and annulment of an order of the State Board of Equalization granting the California Avenue Pharmacy a license to sell intoxicating liquors.

Writ of mandate, requiring respondent board to cancel and annul license, granted.

Louis S. Beedy and George J. Presley, both of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for respondents.

WASTE, Chief Justice.

Over the protest of petitioner, respondent state board of equalization has granted a license to the California Avenue Pharmacy at Palo Alto to sell intoxicating liquors. Petitioner contends that such action is illegal and the license void because issued in direct violation of the provisions of section 172a of the Penal Code, which prohibits the sale of intoxicating liquor within one and one-half miles of the grounds or campus of Stanford University. Petitioner is here seeking a writ of review of the action of the respondent board, and that the order granting and issuing the license be set aside and annulled as being beyond the jurisdiction of the board.

[1] It is stipulated by the parties, in lieu of a return by respondents to the order to show cause issued herein, that "the principal grounds or campus of said university were and are located in Santa Clara county, California, and that the principal educational buildings and the principal administrative offices of said university, and all of its student dormitories were and are situated thereon, and its principal educational activities were and are there conducted, and more than 500 of its students then and now reside or lodge thereon, and that said university at all of said times had and still has an enrollment of more than 1000 students; that all of said facts were set forth in the aforesaid protest filed by petitioner"; that the California Avenue Pharmacy is located at 381 California avenue in Palo Alto, and is 0.7 miles in the usual course of travel (but less in a straight line) from the nearest point on the boundary of the aforesaid campus of the university, as that boundary was defined and established by the board of trustees of the university on December 27, 1918; and that the administration building, which contains most of the principal administrative offices of the university, is located on the campus and is 2.25 miles from the California Avenue Pharmacy in the usual course of travel, but only 1.345 miles in a straight line. These stipulated facts bring the cause within the application of section 172a, supra, which, so far as applicable here, provides that every person is guilty of a misdemeanor who, "upon or within one and one-half miles of the university grounds or campus, upon which are located the principal administrative offices of any university having an enrollment of more than one thousand students, more than five hundred of whom reside or lodge upon such university grounds or campus, sells, gives away, or exposes for sale, any vinous or alcoholic liquors." Matter of Burke, 160 Cal. 300, 116 P. 755, 757.

[2] The question therefore arises, How shall it be determined whether the pharmacy is located within the forbidden area? In the Matter of Burke, supra, it was held that section 172a, supra, applies to the grounds of Stanford University and "that campus which form the center of its activities, and where, because they are the center of its activities, the 'principal administrative offices,' within the meaning of the law, must be located." See, also, In re Brady (Sup.) 106 N. Y. S. 921. We are of the view that the distance is to be measured from the campus limits, and by a direct and straight line. The authorities support that view, and commend it to our consideration and acceptance. Commonwealth v. Jones, 142 Mass. 573, 8 N. E. 603; Woodring v. Nolan (Iowa) 135 N. W. 567; Sheehy v. Johnson, 12 App. D. C. 92.

[3] Rule 3 (b) of the respondent board of equalization reads: "No license of any character will be issued for premises located within any area in which such establishments are prohibited by law because of proximity to State prisons and Federal institutions and schools and construction camps engaged in public works." As the licensed place of business in this case is located in territory in which the sale of intoxicating liquor is prohibited by law, the respondent Board of Equalization granted an illegal and void license to the California Avenue Pharmacy, permitting it to sell intoxicating liquor. Great Western Power Co. v. Supervisors, 21 Cal. App. 146, 131 P. 88; District of Columbia v. Wilson, 44 App. D. C. 265. It is therefore the duty of the board of equalization to cancel and annul the license.

[4-7] Petitioner cannot attain the end sought in this proceeding through the issuance of a writ of certiorari, which will issue only to review the action of an inferior tribunal, board, or officer exercising judicial functions, which has exceeded its jurisdiction. Code Civ. Proc. § 1068. Acts simply ministerial in their nature, and in no sense judicial, such as the granting of the license by the respondents in this case, cannot be reached by a writ of review. Traffic Truck Sales Co. v. Justice's Court, 192 Cal. 377, 381, 220 P. 306. Under the circumstances here presented by the petition and the agreed statement of facts filed in lieu of an answer, we are of the opinion that the situation can be, and, because of its importance to the student body at Stanford University, should be, reached forthwith. The California Avenue Pharmacy cannot lawfully carry on the business of selling intoxicating liquor. A court of equity has full authority to and may close the place or prevent the sale of intoxicating liquor on the premises by order of court and a writ of injunction. George v. Travis, 185 Mich. 597, 152 N. W. 207, L. R. A. 1915E, 408; Cheney v. Coughlin, 201 Mass. 204, 87 N. E. 744. But, while the petition here may have demanded the wrong relief, there is no reason why, with all the facts before us, this

court should not give such appropriate relief as the record warrants. Van Hoosear v. Railroad Commission, 189 Cal. 228, 236, 207 P. 903; Traffic Truck Sales Co. v. Justices Court, supra; Swim v. Superior Court, 193 Cal. 539, 544, 226 P. 2; Finn v. Butler, 195 Cal. 759, 766, 235 P. 992; A. G. Col Co. v. Superior Court, 196 Cal. 604, 613, 238 P. 926. This court has original jurisdiction, conferred by the Constitution, to issue writs of mandate. Const. art. 6, § 4. As we are of the opinion that the license issued by respondent state board of equalization to the California Avenue Pharmacy, to sell intoxicating liquor in Palo Alto and within one and one-half miles of the grounds and campus of Leland Stanford Junior University, should be canceled and annulled, let a writ of mandate issue forthwith requiring the respondent board to cancel and annul the same.

We concur: SHENK, J.; PRESTON, J.; SEAWELL, J.; IRA F. THOMPSON, J.; CURTIS, J.

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1 Cal.2d 697

SNYDER et ux. v. WESTERN LOAN & BUILDING CO. et al.

S. F. 14890.

Supreme Court of California.

Oct. 29, 1934.

Rehearing Denied Nov. 26, 1934.

1. Mortgages ⇨20

Trust deed may legally include provision authorizing beneficiary to take possession of trust property and collect rents and profits immediately on trustor's default.

2. Mortgages ⇨187

Neither trustee nor beneficiary under trust deed can claim rights of mortgagee in possession in absence of specific agreement; rights thereunder depending on powers of trustee, who holds legal title for security, without right to possession in either trustee or beneficiary (Code Civ. Proc. § 744; Civ. Code, §§ 2926, 2927).

3. Mortgages ⇨187

Same rules govern rights of trustee or beneficiary under trust deed to possession of premises as are applicable by statute to mortgagee, whose rights thereto are controlled by agreement or mortgagor's consent (Civ. Code, § 2927).

4. Mortgages ⇨187

Where mortgagee or trustee or beneficiary under trust deed wrongfully ousts one entitled to possession of premises, he is liable as disseisor.

5. Mortgages ⇨187, 199(2)

Parties to trust deed may agree respecting their rights to possession of premises and collection of rents and income to discharge indebtedness.

6. Mortgages ⇨191, 467(3)

Where parties lending money, secured by trust deed, or their trustees are expressly given right to take possession of property and collect rents and income to apply on indebtedness, they may take possession personally or file petition for appointment of receiver to do so.

7. Mortgages ⇨191, 199(2)

Trust deed, conveying premises with rents and right to collect them at any time after default or maturity and authorizing trustee or beneficiary to take possession of property for purpose of doing any act which trustor fails to do as required by deed, authorized beneficiary to take possession and collect rents after trustor's default.

◆

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Suit by Sam Snyder and wife against the Western Loan & Building Company and another. From a judgment for plaintiffs in part, they appeal.

Affirmed.

For prior opinion, see 29 P.(2d) 172.

W. L. Claiborne and Geraldine F. Harrington, both of Oakland, for appellants.

Donahue, Hynes & Hamlin, of Oakland, for respondents.

PER CURIAM.

[1] This cause was taken over upon petition for rehearing. In our former decision, 29 P.(2d) 172, we held that a trust deed may legally include a provision authorizing the beneficiary to take possession and collect the rents and profits immediately upon default of the trustor. With that conclusion we are presently satisfied. However, in said decision we also held that none of the provisions of the trust deed here involved authorized the beneficiary to pursue such a course. We granted the rehearing solely on the latter point and upon further consideration conclude that the trust deed contains provisions

sufficiently definite and comprehensive in their language to authorize the taking of possession and the collection of rents by the beneficiary.

With this introductory statement, we adopt the following portions of our former opinion, with such additions as will hereinafter appear, as and for our decision in the cause:

Appeal by the plaintiffs from a judgment partially in their favor.

The plaintiffs sought an accounting and a recovery from Western Loan & Building Company, which will be referred to as the defendant, of sums of money alleged to have been collected by them while they were in possession of certain real property owned by the plaintiffs.

One Henry G. Hill and his wife owned two separate parcels of land in Oakland. One was improved by an apartment building and the other by garages for the use of tenants of the apartment house. On July 8, 1930, the Hills executed a note and deed of trust on the apartment-house property alone with the defendant as beneficiary to secure a loan of $55,000. The trust deed was duly recorded. As a part of the same transaction, the Hills also executed a conditional assignment of rents which was not recorded. The latter instrument provided for an assignment of all the rents from the apartment house to the defendant Western Loan & Building Company as further security for the debt. It also vested the defendant with power to appoint an agent to take possession, manage the premises, and collect the rents for the purposes of the assignment.

On March 16, 1931, pursuant to an exchange agreement, the Hills deeded all of the real property mentioned to the plaintiffs in exchange for real property in Utah. The deed of the Hills to the plaintiffs was duly recorded. Hill continued to operate the apartment house and garages for the plaintiffs who resided in Coalinga, Cal., and to make payments under the deed of trust to the defendant. About or prior to July, 1932, the plaintiffs defaulted under the trust deed, and on August 1, 1932, the defendant took possession of the apartment house by appointing Hill's manager its agent for the purpose. From that time the defendant collected the rents from the apartment house and the garages and applied them to the indebtedness under the trust deed. On November 25, 1932, the apartment house was sold pursuant to the deed of trust. The defendant made no application for a receiver, nor was one appointed.

The present action was commenced in August, 1932, to enjoin the defendant from exercising acts of possession, for an accounting and other relief. The trial court found that the defendant was in possession and was entitled to the possession of, and the rents from the apartment house property by virtue of the provisions of the deed of trust. The court also found that, since August 1, 1932, the defendant had collected the sum of $210 as garage rentals to which it was not entitled. No finding was made as to the amounts received and collected as rentals of apartments, nor the amounts disbursed in the management thereof. On February 14, 1933, judgment for the plaintiffs was entered for the sum of $210.

The ground of the plaintiffs' appeal is that the trial court erred in finding that the defendant was rightfully in possession of the apartment house, during the period between August 1, 1932, and November 25, 1932, and was entitled to retain the rents collected during that period.

That the assignment of rentals separately executed by the then owners of the property was not recorded is not disputed and the record is that the plaintiffs had no actual knowledge of the existence of that instrument. It is apparently conceded that that instrument cannot operate as a consent to the defendant's possession as against the plaintiffs, and it is not disputed that the plaintiffs did not expressly consent to the possession by the defendant unless that consent is expressed within the terms of the deed of trust; nor is it disputed that the circumstances of the case do not show an implied consent. The issues rest on the proposition advanced by the defendant that it derived its authority to take possession and collect the rents either from the provisions of the trust deed or by the application to the present situation of the rules governing the rights of a "mortgagee in possession."

[2] At common law a mortgage of real property as security was accompanied by a transfer of the possession from the mortgagor to the mortgagee. The mortgagee's possession continued until the debt was discharged, unless otherwise expressly agreed. When by statute or otherwise a mortgage became a lien only and was no longer a conveyance, the transfer of the interest thereby acquired by the mortgagee was no longer accompanied by a change of possession. Code Civ. Proc. § 744; Civ. Code, §§ 2926, 2927; 41 Cor. Jur. 608, §§ 573, 579. There is, however, authority to support the proposition

that a mortgagee, not entitled to possession in the first instance who, at least after default, succeeds peaceably in obtaining possession of the mortgaged premises, cannot be ousted without a tender of the amount due. This doctrine does not depend on the terms of the mortgage, but is applicable by virtue of the relationship existing between the mortgagor and mortgagee. 41 Cor. Jur. 609–612, §§ 577, 580; 2 Jones on Mortgages (8th Ed.) § 824. In defending possession under this theory the manner of the mortgagee's entry becomes an issue. The plaintiffs here contend that the defendant obtained possession by fraud or trick and artifice, and that such an entry is unlawful. However, it becomes unnecessary to discuss that phase of the case inasmuch as it is our conclusion that the relationship among the parties, in the absence of any specific agreement, does not permit either the trustee or the beneficiary under a deed of trust to claim rights accorded to a mortgagee in possession. If the finding that the defendant was in possession by virtue of the terms of the trust deed, and therefore with the express assent given thereunder, is supported, it likewise becomes unnecessary to discuss the manner of its entry.

[3, 4] There is no history or relationship among the parties in the case of a trust deed analogous to that existing with reference to a mortgage. The rights, duties, and obligations under the tripartite agreement depend on the powers vested in and exercised by the trustee who holds the legal title for purposes of security and without any incidental right to possession in either the trustee or the beneficiary. Furthermore, conceding that the defendant may rely on a doctrine analogous to that of a mortgagee in possession, it must accept the rules governing it established under our statutes. With the exception that under a trust deed title passes to the trustee, the characteristics and purposes of a trust deed and a mortgage as they exist in this state have been held to be similar. Bank of Italy v. Bentley, 217 Cal. 644, 655, 657, 20 P.(2d) 940. The right to possession does not pass to the trustee or the beneficiary under a trust deed in the absence of a special agreement. Meadows v. Snyder, 209 Cal. 270, 286 P. 1012; 25 Cal. Jur. 41, 42; 41 Cor. Jur. 609, § 575. We must apply, therefore, the same rules as to the rights of the trustee or the beneficiary to possession of the premises as are applicable by statute in the case of a mortgagee, whose rights to possession, whether before or after default, are controlled by the agreement, or the consent otherwise of the mortgagor, express or implied. Civ. Code, § 2927; Meadows v. Snyder, 209 Cal. 270, 286 P. 1012; Cameron v. Ah Quong, 175 Cal. 377, 165 P. 961; Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765; 17 Cal. Jur. 1020–1022; 1 Jones on Mortgages (8th Ed.) § 22. Where a mortgagee, and likewise a trustee or beneficiary under a trust deed, wrongfully ousts the one entitled to possession, he is liable as a disseisor. 19 R. C. L. 316; Meadows v. Snyder, supra.

[5, 6] Conversely it would seem to follow that the parties to a deed of trust may expressly agree with reference to their respective rights to possession, and collection of the rents and income to be applied to discharge the indebtedness. Such provisions have been upheld. Mines v. Superior Court, 216 Cal. 776, 16 P.(2d) 732; Sacramento & Placerville R. R. Co. v. Superior Court, 55 Cal. 453. Where the lending parties or their trustees are expressly given the right to enter and take possession of the property and collect and apply the rents and income to the discharge of the indebtedness, they have the option to take such possession personally or to file a petition to have a receiver appointed to take possession. American Bridge Co. v. Heidelbach, 94 U. S. 798, 24 L. Ed. 144.

[7] From the facts shown by the record in this case, it is apparent that the defendant in taking possession and retaining the rents collected by it during the period involved was attempting to act pursuant to the terms of the unrecorded assignment of rentals. It is now faced with the necessity of justifying its act under the provisions of the deed of trust as against the plaintiffs, the grantees of the trustors. In the deed of trust, following the usual granting clauses, appears the following: "Together also with the rents, issues, profits and income from said premises with the right at any time after default or maturity to collect the same, and to enforce this provision the trustee shall be entitled to the appointment of a receiver." The defendant relies upon that language and upon the following language also appearing in the deed of trust: "Should trustor fail or refuse to make any payment or do any act which he is obligated hereunder to make or do at the time and in the manner herein provided, then the trustee and/or beneficiary, each in its sole discretion, may without notice to or demand on trustor and without releasing trustor from any obligation thereof: (1) Make or do the same in such manner and to such extent as it may deem necessary to protect the security of this deed of trust, either trustee or beneficiary being authorized to enter upon and

take possession of said property for such purposes."

In our opinion the provisions of the trust deed when construed as a whole, and particularly the quoted provisions, grant to the beneficiary, in the event of default, the right to take possession and collect the rents. It necessarily follows that the trial court's finding that the defendant was in possession pursuant to the provisions of the trust deed is amply supported and the defendant is therefore entitled to retain as against the plaintiffs the apartment rentals collected by it during the period involved.

The judgment is affirmed.

SHOUSE v. QUINLEY.*

S. F. 15064.

Supreme Court of California.

Nov. 1, 1934.

Rehearing Granted Nov. 28, 1934.

1. Constitutional law 🔑154(1)

As respects impairment, time and method of payment are material parts of obligations of contract (Const. Cal. art. 1, § 16; Const. U. S. art. 1, § 10).

2. Constitutional law 🔑143
Waters and water courses 🔑216

Amendment to Irrigation District Act permitting landowners holding defaulted matured bonds or interest coupons to apply them in payment of assessments, *held* unconstitutional impairment of obligation of contract giving bondholders right to payment in order of presentation, by preferring landowning bondholders (Gen. Laws 1931, Act 3854, § 52a, as added by St. 1933, p. 532; Const. Cal. art. 1, § 16; Const. U. S. art. 1, § 10).

3. Constitutional law 🔑143

Amendment to Irrigation District Act permitting landowners holding defaulted matured bonds, or interest coupons to apply them to payment of assessments, *held* not valid as emergency measure in view of absence of declared legislative intent to that effect, and of Legislature's failure to limit its operation to exigency and fact that amendment in effect is preferential and that relief attempted to be extended is not cognate to historic exercise of equitable jurisdiction (Gen. Laws 1931, Act 3854, § 52a, as added by St. 1933, p. 532; Const. Cal. art. 1, § 16; Const. U. S. art. 1, § 10).

In Bank.

Proceeding in mandamus by E. C. Shouse against C. W. Quinley, as Collector of the Waterford Irrigation District.

Peremptory writ denied.

Hankins & Hankins, of San Francisco, and A. L. Cowell, of Fort Stockton, for petitioner.

Thomas C. Boone and Griffin & Boone, all of Modesto, for respondent.

Louis Bartlett and Milton T. Farmer, both of San Francisco, amici curiæ.

IRA F. THOMPSON, Justice.

This is a proceeding in mandamus to compel the collector of the Waterford irrigation district to accept a credit memorandum, issued by the treasurer of the district in return for surrendered matured interest coupons on the bonds of the district, in payment of the second installment of the 1932 assessment on petitioner's land in the district, to the extent that the assessment was levied to meet bond principal and bond interest.

The amount of the tender was admitted to be as authorized by section 52a of the California Irrigation District Act (St. 1897, p. 254, as amended, Deering's Gen. Laws 1931, Act 3854, vol. 2, p. 1948 et seq.), added by amendment in 1933 (St. 1933, p. 532), but was refused by the collector on the grounds that:

(1) Section 52a is unconstitutional.

(2) If valid, the tender was insufficient in that it attempted to pay by a credit memorandum of bond interest coupons the portion of the assessment levied for bond principal as well as that for bond interest.

(3) The interest coupons represented by the credit tendered were not the first coupons registered and therefore cannot be accepted till all prior registered coupons are paid.

The questioned section provides that, notwithstanding any other provisions of the act, "any owner of land within the district who is the holder of any matured bond or interest coupon issued by the district, which bond or interest coupon remains unpaid by reason of insufficiency of money * * * is authorized to apply the credit represented by such unpaid bond or coupon as a medium of exchange in the payment of assessments levied against the lands of such person in the manner hereinafter specified.

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*For subsequent opinion see 45 P.2d 701.

"Upon presentation and surrender to the treasurer of the district of such matured bonds or interest coupons, or both, the treasurer shall issue to the holder a memorandum in writing, in duplicate, indicating the amount of credit represented by such bonds or coupons, or both, to which such holder is entitled to apply on such assessments.

"The collector shall accept the credit memorandum in lieu of lawful money for that portion of the total assessment levied on the lands of the holder of such bonds or coupons equivalent to the amount of such assessment as was levied to pay the interest and maturing principal of the bonds of the district, together with penalties, interest and costs in case of delinquency. The balance of the assessment shall be paid in money. * * *

"The treasurer of the district shall accept such credit memoranda, to the extent that the same have been applied upon such assessment, as the equivalent of money. The treasurer shall thereupon cancel the bonds and coupons for which such credit was given if the entire amount of the credit memoranda has been applied to the payment of assessments and in the event that only a portion of the credit has been applied, then the treasurer shall indorse upon the face of such bond or coupon the fact that the same has been paid in part to the extent of the credit so applied. * * *"

The respondent asserts that the section is in violation of section 16 of article 1 of the state Constitution and section 10 of article 1 of the Federal Constitution. The former provides, among other things, that no "law impairing the obligation of contracts shall ever be passed," and the latter that no state shall pass a law, impairing the obligation of contracts.

For our purposes it is sufficient to note that in 1919 and prior thereto the district had issued and sold the bonds which give rise to this controversy. Prior to the demand by petitioner upon the collector, the district had made default in the payment of both principal and interest and matured bonds and interest coupons had been presented and registered for payment in the order of their presentation. It is not contended by petitioner that he is entitled to payment as being prior in time of presentation, but he stands upon the letter of the law which permits the landowner, who is the holder of any matured bond or interest coupon, to pay his assessment (excepting the portion thereof assessed for maintenance) therewith. He does not dispute the proposition that there exists a contract between the district and the bondholder and that the provisions authorizing the bonds and providing for their payment at the time of their issuance constitute terms of the contract, but he says section 52a does not substantially postpone, obstruct, or retard the enforcement of rights of the bondholder or lessen the value of his holdings.

At the time of the issuance of the bonds, the act provided that they should be paid from revenue derived from an annual assessment on the lands of the district (section 33 [Deering's Gen. Laws Act 3854]), which the board of directors was required to levy annually in an amount sufficient to meet all matured and maturing bonds and coupons for that year (section 39); provided that the assessments should be paid into the treasury and apportioned to the different funds (section 39a); that the assessments were to be paid in gold and silver coin (changed in 1933 to "lawful money") (section 41, as amended by St. 1933, p. 1627); that there should be three funds, bond fund, construction fund, and general fund (in 1931 the first fund was divided into the bond principal fund and the bond interest fund (section 67); and that upon presentation, a matured bond or interest coupon should be paid from the bond fund or, if money were not available, it should be registered and draw interest at 7 per cent. (in 1931 this section was amended to provide for payment of bond principal from the bond principal fund and of interest coupons from the bond interest fund in harmony with changed section 67 (section 52). By the general terms of the act, the bondholder had the right to have his bonds paid upon presentation if money were available and if not to have them registered and paid in the order of presentation. Bates v. McHenry, 123 Cal. App. 81, 10 P.(2d) 1038.

[1, 2] It thus becomes apparent that the result of the questioned section is first of all to abrogate the law with respect to the order of payment. So changed, it is as though the law read: Landowners who are the owners or who become such by purchase or otherwise of matured bonds or interest coupons shall be entitled to payment in preference to or without regard to bonds or coupons which have matured and which have been presented and registered previously for payment. In the second place, in view of the only condition of the section, to wit, that the bonds or coupons shall be matured and be "unpaid by reason of insufficiency of money," the result, regardless of the financial condition of the district, is to hold before the landowners, the source of the money with which the district makes pay-

ment, the temptation of withholding payment of assessments in order to bring about the named condition and a depreciated market for the bonds, which may then be purchased and used as a medium of payment at face value. The two results mentioned very obviously demonstrate that the nonlandowning bondholder would suffer a very severe change of his contract were it to be held that the section does not impinge upon the constitutional provision against the impairment of the obligation of contracts. It requires no argument to establish that time and method of payment are material and vital parts of the obligations of a contract. The books are full of authorities to this effect, of which we need only cite the following: Hershey v. Cole, 130 Cal. App. 683, 20 P.(2d) 972; Security Trust & Savings Bank v. City of Los Angeles, 120 Cal. App. 518, 7 P.(2d) 1061; Welsh v. Cross, 146 Cal. 621, 81 P. 229, 106 Am. St. Rep. 63, 2 Ann. Cas. 796; Chapman v. Jocelyn, 182 Cal. 294, 187 P. 962; Jeffreys v. Point Richmond C. & L. Co., 202 Cal. 290, 260 P. 548.

It is no answer to say, as does petitioner, that the postponement of time of payment is caused by conditions, and not by the act of the district in accepting bonds or coupons in payment of the assessment. The very statement of the argument refutes itself, because the bondholder next in order of presentation is entitled to be paid with the sums realized from the assessment for that purpose and not to be indefinitely postponed. Going one step further into the field of practical finance for the purpose of illustrating the seriousness of the impairment and, bearing in mind that confidence is the foundation upon which the superstructure of credit and prosperity is built, we may well query: How many bonds could have been sold to others than landowners had the questioned section with its incentive to default in the payment of assessments been a part of the law at the time the bonds were issued? Obviously, too, there is no merit in the suggestion of petitioner that the act affords a secondary market to the bondholder. What has been said also disposes of the contention that the acceptance of the bonds in payment of the assessment retires the bond and gives the bondholder greater assurance that eventually his bond will be paid.

Similar legislation has been condemned by the courts in the following cases: In re Cranberry Creek Drainage District, 202 Wis. 64, 231 N. W. 588, 85 A. L. R. 242; Howard v. State, 226 Ala. 215, 146 So. 414; State v. Cherry (Ark.) 67 S.W.(2d) 1024; Straus v. Ketchen (Idaho) 28 P.(2d) 824; McNee v. Wall (D. C.) 4 F.Supp. 496; Keefe v. City of St. Petersburg (D. C.) 5 F.Supp. 132; Moore v. Branch (D. C.) 5 F.Supp. 1011.

[3] However, the petitioner argues that the legislation may be sustained upon the theory that it was designed to meet an emergency and hence its validity may be upheld upon the authority of Home Building & Loan Ass'n v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481, and Des Moines Joint Stock Land Bank v. Nordholm (Iowa) 253 N. W. 701. The first of the two mentioned cases involved a statute of Minnesota (Laws Minn. 1933, c. 339) which provided that "only during the continuance of the emergency and in no event beyond May 1, 1935" (section 8), the period of redemption might be extended by the application of the mortgagor to the court having jurisdiction of the foreclosure, for an order fixing the reasonable value of the income or the reasonable rental value of the property involved and directing him to pay all or a reasonable part thereof "toward the payment of taxes, insurance, interest, mortgage or judgment indebtedness" (section 4) at the times and in the manner to be fixed and determined. The act recited the emergency. It further provided that, in case of the failure of the mortgagor to pay the sums required by the order or the commission of waste by him, the period of redemption should expire thirty days thereafter. In sustaining the legislation against an attack upon the ground that the act infringed the provision of the Federal Constitution forbidding states to pass laws impairing the obligations of contracts, a majority of the Supreme Court said, page 242 of 54 S. Ct.: "The legislation was addressed to a legitimate end; that is, the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society." It also said: "The relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency, and could be granted only upon reasonable conditions." In view of this last-quoted statement and in order to properly evaluate its significance, we also quote a passage which very shortly follows and which may be said to constitute the whole crux of the case. It reads: "In the absence of legislation, courts of equity have exercised jurisdiction in suits for the foreclosure of mortgages to fix the time and terms of sale and to refuse to confirm sales upon equitable grounds where they were found to be unfair or inadequacy of price was so gross as to

shock the conscience. The 'equity of redemption' is the creature of equity. While courts of equity could not alter the legal effect of the forfeiture of the estate at common law on breach of condition, they succeeded, operating on the conscience of the mortgagee, in maintaining that it was unreasonable that he should retain for his own benefit what was intended as a mere security, that the breach of condition was in the nature of a penalty, which ought to be relieved against, and that the mortgagor had an equity to redeem on payment of principal, interest and costs, notwithstanding the forfeiture at law. This principle of equity was victorious against the strong opposition of the common-law judges, who thought that by 'the Growth of Equity on Equity the Heart of the Common Law is eaten out.' The equitable principle became firmly established, and its application could not be frustrated even by the engagement of the debtor entered into at the time of the mortgage, the courts applying the equitable maxim 'once a mortgage, always a mortgage, and nothing but a mortgage.' Although the courts would have no authority to alter a statutory period of redemption, the legislation in question permits the courts to extend that period, within limits and upon equitable terms, thus providing a procedure and relief which are cognate to the historic exercise of the equitable jurisdiction."

Again the court said: "The legislation is temporary in operation. It is limited to the exigency which called it forth. While the postponement of the period of redemption from the foreclosure sale is to May 1, 1935, that period may be reduced by the order of the court under the statute, in case of a change in circumstances, and the operation of the statute itself could not validly outlast the emergency or be so extended as virtually to destroy the contracts." The Nordholm Case, decided by the Supreme Court of Iowa, involved a similar statute and a similar result was reached by a divided court upon the authority of the Blaisdell Case.

We are not confronted by a similar question. The Legislature did not with respect to the present legislation declare the emergency, nor did it purport to confine the act to the period of an emergency. In fact, legislation of a different character was adopted in 1933 (amendment to California District Securities Commission Act, St. 1933, p. 355), which, while declaring the existence and nature of the emergency and the necessity of exercising "the police power of the state to preserve the public welfare," provided that when any district is in default on its bond principal or interest "to the extent of not less than twenty per cent (20%) of the amount due" (section 1), it shall become subject to the supervision of the California district securities commission which shall make an investigation of its affairs and which may approve the annual assessment only for such total amount as it will be reasonably possible for the lands in the district to pay "without exceeding a delinquency of fifteen per cent" (section 1). A consideration of the fact of the declared emergency in the act just mentioned, together with other legislation avowedly designed to meet the exigencies of the times, and the entire absence of similar declaration with respect to the section under consideration, or limitation of its operation, is sufficient evidence that it was not intended solely as a measure to meet an emergency. In this connection it is enlightening to observe the comments of the United States Supreme Court in the case W. B. Worthen Co. v. Thomas, 292 U. S. 426, 54 S. Ct. 816, 819, 78 L. Ed. 1344, 93 A. L. R. 173, upon its previous opinion in Home Building & Loan Ass'n v. Blaisdell. We there read: "We held that when the exercise of the reserved power of the State, in order to meet public need because of a pressing public disaster, relates to the enforcement of existing contracts, *that action must be limited by reasonable conditions appropriate to the emergency*. This is but the application of the familiar principle that the relief afforded must have reasonable relation to the legitimate end to which the State is entitled to direct its legislation. Accordingly, in the case of Blaisdell, we sustained the Minnesota mortgage moratorium law in the light of the *temporary and conditional relief* which the legislation granted. We found that relief to be reasonable, *from the standpoint of both mortgagor and mortgagee, and to be limited to the exigency to which the legislation was addressed*." (Italics ours.) Not only is there no attempt to confine or limit the act to the emergency, but also it does not consider the interest of the nonlandowning bondholder. It cannot be said of section 52a of the California Irrigation District Act, as was said in the Blaisdell Case, page 243 of 54 S. Ct.: "The relief afforded by the statute has regard to the interest of mortgagees as well as to the interest of mortgagors." Petitioner's argument that the bondholder is credited with 7 per cent. interest after maturity and presentation falls short of the mark for the obvious reason that this right to be credited with an increased interest rate is one extended originally to all bondholders upon the maturity and presentation of their bonds and coupons, and has no bearing upon the right of the bondholders to payment in the order of the presentation of the bonds or coupons. In short, the section attempts to extend a preference instead of considering the interests of all parties. In view of the absence of a declared legislative intent to adopt the section as an emergency measure, and of its failure to limit its operation to the exigency to which it is said to be directed, and of the fact that the section, in effect, is preferential rather than considerate of the interests of all parties, together with the further fact that the "procedure and relief" here attempted to be extended are not, as they were in the Blaisdell Case, "cognate to the historic exercise of the equitable jurisdiction," it must follow that the legislation must fall under the reasoning of that case.

This conclusion renders unnecessary any consideration of the other objections of respondent to the acceptance of the coupons in payment of assessments.

The peremptory writ is denied.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; SEAWELL, J.

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1 Cal.2d 739

LANDSBOROUGH v. KELLY, State Director of Public Works, et al.

S. F. 15050.

Supreme Court of California.

Nov. 1, 1934.

1. Highways 🔑113(3)

Statute requiring alternate plans and specifications for highway paving, where conditions do not require use of particular type, had purpose of making choice of type matter to be determined by competitive bidding, and "conditions" referred to physical conditions, not economic factors (Pol. Code, § 365e½, as added by St. 1933, p. 1770).

[Ed. Note.—For other definitions of "Condition," see Words & Phrases.]

2. Statutes 🔑47, 123(4)

Statute requiring alternate plans and specifications for highway paving, where conditions do not require use of particular type of pavement, *held* not invalid as uncertain or as having a misleading title (Pol. Code, § 365e½, as added by St. 1933, p. 1770).

3. Mandamus 🔑92

Mandamus is proper, where there has been abuse of discretion in not preparing alternate plans and specifications for highway paving as required by statute, for, while mandamus will not lie to compel exercise of discretion in particular manner, it will lie to correct abuse of discretion, and, where petitioner is entitled to certain action, it may be used to compel such action (Pol. Code, § 365e½, as added by St. 1933, p. 1770).

4. Highways 🔑113(3)

Highway officials abused discretion in failing to call for alternate bids for highway paving as required by statute when conditions do not require use of particular type of pavement, in view of showing that either of approved types would be successful, their action not being justified because of honest opinion that one type will cost more than another, since physical conditions alone are committed to their discretion (Pol. Code, § 365e½, as added by St. 1933, p. 1770).

In Bank.

Petition for writ of mandate by William L. Landsborough against Earl Lee Kelly, as State Director of Public Works, and others.

Peremptory writ issued.

Warren Olney, Jr., J. M. Mannon, Jr., Edwin S. Pillsbury, and McCutchen, Olney, Mannon & Greene, all of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., E. B. Power, Asst. Atty. Gen., C. C. Carleton and Frank B. Durkee, both of Sacramento, Jack Howard, of San Francisco, and C. R. Montgomery, of Sacramento, for respondents.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, amici curiæ.

PER CURIAM.

This is a petition for a writ of mandate. Petitioner brought this proceeding as a citizen, resident, elector, and taxpayer of the state of California and the county of Kern, to compel respondents to take certain action with respect to a highway construction project. Respondents are Earl Lee Kelly, director of public works; C. H. Purcell, chief of the division of highways and state highway engineer, and G. T. McCoy, assistant state highway engineer.

In April, 1932, R. E. Pierce, one of the district engineers of the division of highways recommended the construction of a portion of the main highway from Sacramento to San Francisco, located between Fairfield and Vacaville, approximately 3.3 miles long, commonly known as the Vacaville project. On August 5, 1933, the California highway commission adopted a revised budget, allocating therein the maximum sum of $172,000 for this work. Thereafter respondents approved plans and specifications and cost estimates, which provided that the paving of the proposed highway should consist of asphalt concrete pavement, constructed in accordance with the "Standard Specifications" of the department of public works, division of highways, an official publication. On November 10, 1933, respondents took preliminary steps toward letting a contract for the proposed road by issuing a notice of the work and call for sealed bids. Bids were to have been opened on November 29, 1933, but, shortly prior to that date, petitioner brought this proceeding, and this court issued an alternative writ of mandate commanding respondents to withdraw the plans and specifications from competitive bidding reject any and all bids submitted on said plans and specifications, and to amend the same to provide for the alternate use of Portland cement concrete pavement and asphalt concrete pavement, or to prepare new plans and specifications making such provision. Bids were thereupon returned unopened and no further action in connection with the award of the contract was taken. Respondents filed a demurrer and an answer to the alternative writ. On the return day, this court made an order referring issues of fact to Hon. A. E. Shaw as referee. Hearings were held by him, and findings of fact were made and filed.

The issue involved is the validity, construction, and effect of section 365e½ of the Political Code, enacted in 1933 (St. 1933, p. 1770). It appears that prior thereto it was the policy of the department of public works, in constructing highways of superior quality, to use either asphalt concrete or Portland cement concrete, and, by specifying only one in connection with a particular job, to maintain some sort of equality between the two types of material, where engineering conditions permitted, in order not to discriminate against the financial interests concerned in each industry. Section 365e½, obviously designed to effect a change in this policy, reads as follows: "Whenever any high-type paving work is to be done by contract under the control and direction of the Department of Public Works which is to be paid for in whole or in part with moneys coming out of the State highway maintenance fund or the State highway construction fund, and in the judgment of said department the conditions do not require the use of a particular type of pavement, the said department shall cause to be prepared alternate plans and specifications contemplating the use of all such materials as are adopted as standard for high-type paving by the Division of Highways and acceptable to it. The Department of Public Works shall then advertise and call for bids for the doing of such work based on the use of such alternate materials and upon receipt of such bids shall proceed to the award of a contract to the lowest qualified bidder. Whenever the words 'high type paving' are used in this act, they shall be construed to include only asphalt concrete pavement and Portland cement concrete pavement as designed by the Division of Highways."

[1] It is clearly the purpose of this statute to make the choice of one or the other type of pavement (apart from engineering considerations) a matter to be determined by competitive bidding. The "conditions" mentioned are undoubtedly the physical conditions and not the economic factors. Where a particular road, as a matter of engineering, requires for its proper construction and maintenance asphalt concrete pavement alone, or Portland cement concrete pavement alone, this may be specified; but, where a satisfactory road may be built of either type, and neither involves excessive maintenance costs, alternate specifications must be made. It is plainly improper to specify one type on the ground of its lower initial cost, since the Legislature has expressly provided for alternate bids; thus evidencing an intention to have the cost determined by competitive bidding, and not by estimates of the department. It is entirely possible that a contractor, by reason of his equipment, experience, or other factors, may use the more expensive of the two materials, and yet submit a lower bid for the entire job than a contractor using the cheaper material.

The findings of the referee are mainly in favor of petitioner. He found in substance that respondents Kelly, Purcell and McCoy did not personally determine that the conditions of the Vacaville project required the use of a particular type of pavement, but that they left these matters in this and in all other cases for the determination of the engineers of the division of highways; that respondents had laid down no policy with reference to conditions requiring the use of asphalt concrete pavement or Portland cement concrete pavement; that, since section

365e½ took effect, contracts for about fifty projects had been let, and that in no case were alternate plans and specifications drawn or alternate bids called for; that, in approximately 90 per cent. of the highway projects where high-type paving is desired, it is feasible to use either type of pavement if initial cost is disregarded; that up to June 30, 1932, 1,359 miles of primary state highways and 340 miles of secondary state highways in this state were constructed with Portland cement concrete pavement, and only 623 miles of primary and 169 miles of secondary highways with asphalt concrete pavement; that the conditions of the Vacaville project do not require a particular type of pavement, and that Portland cement concrete pavement would be as suitable as asphalt concrete pavement, provided that the element of initial cost is left out of consideration; that, while it is probable that the use of the Portland cement type would cost more than the other, it is impossible to state what the difference in cost, if any, would be; and that only competitive bidding upon the basis of alternate plans and specifications would accurately determine the difference.

The referee found also that R. E. Pierce, engineer in charge of the district in which the proposed road is located, originally recommended Portland cement concrete for the job; that later he, together with B. W. Booker, office engineer of the district, recommended asphalt concrete pavement instead, the change in recommendation being based upon an increased cost of the Portland cement type, and also an adverse soil condition, which could, however, be overcome by laying a thicker subgrade of selected material; that Fred J. Grumm, engineer of surveys and plans of the division of highways, approved the changed recommendation for the above reasons and for the additional reason that the project involved side-hill cuts and fills, but he admitted that, disregarding cost, a satisfactory highway could be made with Portland cement concrete paving.

These findings are all supported by the evidence. Petitioner contends that they establish either failure to exercise discretion, or a clear abuse thereof, justifying the issuance of the writ. Respondents take the position that the determination made was within their discretion, and was based upon conditions of the proposed work. They also attack the constitutionality of the statute.

[2] The constitutional points require no discussion. The statute is said to be uncertain, and to have a misleading title. These issues are not greatly stressed, and, in our opinion, are wholly without merit.

[3] The propriety of the remedy of mandamus, in the event that an abuse of discretion is proved, is clear. While mandamus will not lie to compel the exercise of discretion in a particular manner, it will lie to correct an abuse of discretion, and, where the petitioner is clearly entitled to a certain action, may be used to compel such action. Wood v. Strother, 76 Cal. 545, 18 P. 766, 9 Am. St. Rep. 249; Tulare Water Co. v. State Water Commission, 187 Cal. 533, 202 P. 874; Inglin v. Hoppin, 156 Cal. 483, 105 P. 582. The case of Stanley-Taylor Co. v. Board of Supervisors, 135 Cal. 486, 67 P. 783, is distinguishable, for there the board had a right to reject bids according to its own belief as to the public interest, whereas here the discretion is to be exercised upon consideration of the conditions of the road.

[4] In the light of the findings and the evidence, it is possible to reach but one conclusion: That the respondents were guilty of an abuse of discretion in failing to call for alternate bids. R. E. Pierce, district engineer, B. W. Booker, office engineer, and Fred J. Grumm, of the headquarters office, each testified under cross-examination that by taking proper precautions a satisfactory road could be built with Portland cement concrete Grumm, for example, was asked: "Q. And by spending such money as is necessary to build a suitable subgrade on which to lay a PCC pavement on this Vacaville project, you could have built there a road with a PCC pavement which would have had as good an expectancy of life as that ordinarily used by the highway department when it puts in PCC pavement in ordinary practice? A. I believe I could do that and have an assurance that that Portland cement concrete pavement would endure similarly to that placed under more favorable conditions." J. J. Jessup, a civil engineer, formerly city engineer and superintendent of streets of Berkeley and city engineer of Los Angeles, testified that he had made a careful study of the plans and specifications and of conditions on the ground; and that, not only would Portland cement concrete be proper, but "any other conclusion in my estimation, practically eliminates the use of Portland cement concrete pavement for high type pavement." As above stated, the referee found that this type was suitable. In spite of this testimony and these admissions, respondents assert that it was entirely proper to call for but one type of pavement. They argue

that they came to the honest conclusion, as a result of engineering reports, that the physical conditions—adverse soil, hill cuts, and fills, were unsuitable for Portland cement pavement. If that type were used, they say, it would be necessary for the contractor to go to such excessive expense in preparing the subgrade and in overcoming other adverse conditions that he could not possibly do it at a figure which would compete with the contractor using the asphalt type. They conclude that the preparation of alternate plans and specifications would be an idle act, resulting in needless extra expense.

This reasoning nullifies the effect of the statute. It was undoubtedly the intention of the Legislature to eliminate favoritism, prejudice, and artificially maintained equality between producers, and to make the choice of pavement a result of free, competitive bidding between the two recognized superior materials. The primary object is of course economy in road construction, but the Legislature has determined that such economy is to be achieved by means of competition between the producers of two standard materials. If the department substitutes its own judgment on costs, the benefits of such competition are lost. The judgment of the department may be an entirely honest one, and in the present proceeding no bad faith is charged. But, under the statute, an honest opinion that one type of pavement will cost more than another cannot be the basis of the department's action. Physical conditions alone are committed to the discretion of the respondents.

We may concede that in an exceptional case, where the cost of overcoming adverse conditions would be so unusually high that it would be foolish to expect any competition, the department might be justified in dispensing with alternate bids. Petitioners make the same concession. In such a case the physical conditions may be said to require one type, since those conditions could not be changed save at unreasonable expense. But in the instant case we have an original recommendation by a qualified officer, for Portland cement type pavement, and a finding by the referee that the added cost, if any, of preparing the road for such pavement, is uncertain, and cannot be determined save by competitive bidding. Respondents had no definite information on this matter, and Grumm's rough estimate on the stand amounted to between $6,500 and $7,000 per mile of road. Since the total job embraced something over three miles and was estimated originally to cost $172,000, if done with Portland cement concrete, there is certainly no such unreasonable difference, even accepting Grumm's guess, as to justify the failure to call for alternate bids. There is evidence in the record that bids might possibly be as much as 25 per cent. below the estimated cost. And the figure given was plainly conjectural, since Grumm admitted that he had not prepared plans and specifications, and could not definitely state what precautions and corrective steps would be needed to prepare the soil for Portland cement concrete.

It follows that petitioner is entitled to the relief demanded; namely, the preparation and issuance of new or amended plans, specifications, notices, and advertisements providing for the alternate use of Portland cement concrete pavement and asphalt concrete pavement.

Let a peremptory writ of mandate issue accordingly.

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1 Cal.App.2d 745

SILVA v. RODERICK et al.

Civ. 8913.

District Court of Appeal, Second District,
Division 2, California.

Nov. 5, 1934.

Appeal and error 🔑1011(1)

In action for false arrest, findings of court sitting without jury based on conflicting evidence will not be disturbed, particularly where appellant did not indicate specifically wherein evidence was insufficient.

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by Manuel A. Silva against Tony Roderick and another. From an adverse judgment, named defendant appeals.

Affirmed.

David F. Hart, of Santa Maria, for appellant.

Preisker, Goble & Twitchell and Morris J. Stephan, all of Santa Maria, for respondent.

WILLIS, Justice pro tem.

Plaintiff in the court below brought suit against appellant and one Harry E. Fryer, constable of a township in Santa Barbara county, for damages, both actual and exemplary, for false arrest and imprisonment. It appears from the record without substantial dispute that appellant, as a citizen, arrested respondent without a warrant in the presence of the constable, who had refused to make any arrest, and took him in the constable's automobile, accompanied by the constable, to the city of Santa Maria, where he and the constable placed him in the city jail, where he remained imprisoned for about one and one-half hours, respondent being then released by the constable on demand of respondent's attorney without any complaint having been filed or warrant issued. Appellant claimed at the trial and still asserts that he had reasonable cause to believe that respondent was committing or attempting to commit a public offense, to wit, stealing a crop of carrots then growing in the ground and in process of harvesting, when he arrested respondent.

After trial by the court without a jury, the court filed its findings and conclusions and judgment was entered thereon in favor of respondent and against appellant only, for $250 actual damages and $250 as exemplary damages, the constable being exonerated from all liability. From this judgment, this appeal is presented, appellant stating in his opening brief that the questions involved herein are: First, the court erred in finding that the appellant arrested respondent; second, the court erred in finding that appellant was responsible for the incarceration of respondent; and, third, the damages are excessive. Without stating any points or indicating specifically wherein the evidence is insufficient to support the findings, appellant reviews at some length the evidence and argues that appellant had probable grounds to believe that a crime was being committed in his presence; that appellant's responsibility ended when he turned respondent over to the constable; and that it was the officer's duty then to take respondent before the nearest magistrate. All these contentions were determined adversely to appellant's contentions by the decision of the lower court on evidence of a conflicting nature as to probable cause and as to whether a crime was actually being or attempted to be committed at the time of arrest. There is nothing in the record of the proceedings in the court below, nor in appellant's briefs on this appeal, to show that the findings are not supported by substantial evidence nor that the damages awarded are excessive.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

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1 Cal.App.2d 737

RIGALL et al. v. LEWIS.

Civ. 8585.

District Court of Appeal, Second District, Division 1, California.

Nov. 5, 1934.

Rehearing Denied Nov. 30, 1934.
Hearing Denied by Supreme Court Jan. 3, 1935.

1. New trial 🔑9

Court could grant new trial on plaintiffs' motion, on ground of insufficiency of evidence to sustain verdict, with issues limited to determination of amount of damages, where plaintiffs were awarded verdict for nominal damages (Code Civ. Proc. §§ 657, 662).

2. Appeal and error 🔑979(2)

Order granting new trial on ground of insufficiency of evidence to sustain verdict will not be disturbed on appeal, unless abuse of discretion by trial court is plainly apparent, and, if any appreciable conflict in evidence exists, such order is conclusive.

3. New trial 🔑111

Trial court may grant new trial on plaintiff's motion when verdict is for plaintiff for nominal sum.

4. Appeal and error 🔑882(12)

Defendant could not complain of instruction causing verdict for plaintiffs for sum of $1, which was given at defendant's request.

5. New trial 🔑163(2)

Granting of new trial vacates judgment rendered after trial and in pursuance thereof.

Appeal from Superior Court, City and County of Los Angeles; Joseph P. Sproul, Judge.

Action by R. D. Rigall and others against Clif Lewis. From a judgment for plaintiffs in the sum of $1, and an order granting a new trial on plaintiffs' motion, defendant appeals.

Affirmed, and part of judgment affected by order granting new trial vacated.

Hearing denied by Supreme Court; CURTIS, J., dissenting.

Chase, Barnes & Chase, of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson and Baldwin Robertson, all of Los Angeles (Scott N. Thompson, of Los Angeles, of counsel), for respondents.

HOUSER, Justice.

In an action brought for the purpose of recovering a judgment for damages that resulted to plaintiff Rigall as the surviving husband, and to plaintiffs Sundsmo, as the surviving parents, of a woman passenger in an automobile that collided with another automobile at a street intersection, plaintiffs were awarded a verdict in the sum of $1. On the specified ground of the insufficiency of the evidence to sustain the verdict, by order of the trial court the general motion for a new trial interposed by plaintiffs was granted, with the issues on the hearing of such new trial limited to a determination of the amount of damages that should be awarded to plaintiffs. It is from such order, as well as from the judgment in said action, that the instant appeal is prosecuted.

[1-3] The first point urged by appellant, to the effect that on granting a motion for a new trial the trial court had no authority to grant it as to part of the issues only, is refuted by the provisions contained in sections 657 and 662 of the Code of Civil Procedure, as well as by the respective rulings made in each of the cases of Tumelty v. Peerless Stages, 96 Cal. App. 530, 274 P. 430, and Amore v. Di Resta, 125 Cal. App. 410, 13 P.(2d) 986. See, also, 20 Cal. Jur. 35. However, appellant suggests that because the verdict for plaintiffs was for nominal damages only, the clear indication was that the jury meant to return a verdict in favor of defendant. In that regard, it may be conceded that in some jurisdictions such a rule would seem to prevail; but in this state it is well established that where, as here, the reason specified by the trial court for granting a new trial is that the evidence adduced on the trial of the action was insufficient to sustain the verdict, the order by which the new trial was granted will not be disturbed on appeal therefrom, unless an abuse of discretion by the trial court is plainly apparent. It also has been decided that if any appreciable conflict exist as between the evidence produced by the respective parties to the litigation, such an order is conclusive. 2 Cal. Jur. 908, 840, and authorities there cited. That when a verdict returned in favor of the plaintiff is for a nominal sum the trial court is authorized to grant a motion presented by the plaintiff for a new trial, see Mariani v. Dougherty, 46 Cal. 27, and Wolford v. Lyon Gravel, etc., Co., 63 Cal. 483. From a consideration of the evidence adduced on the trial of the instant action, it is manifest not only that the trial court did not abuse its discretion in making the order in question, but that such evidence fully justified the trial court in that regard.

[4] Appellant further complains that in the giving of a certain instruction to the jury the trial court committed error prejudicial to defendant, with the result that the verdict was returned, as it was, in favor of plaintiffs for the sum of one dollar. However, right or wrong, the instruction to which appellant has directed attention was given at his own request; from which it follows that he is in no position to complain regarding it.

Appellant also predicates prejudicial error to him on the denial by the trial court of his request to give to the jury each of two other instructions. An examination of the record discloses the fact that the principles of law contained in the requested instructions were fully covered by other instructions which the trial court gave to the jury.

[5] It is ordered that the order by which a new trial was granted be, and it is, affirmed; furthermore, in accord with the well-settled rule "that the granting of a new trial vacates the judgment which has been rendered after the trial and in pursuance thereof" (Lapique v. Walsh, 191 Cal. 22, 24, 214 P. 876, 877; 20 Cal. Jur. 199), it is ordered that that part of the judgment which is affected by the order in question be, and it is, vacated.

We concur: CONREY, P. J.; YORK, J.

1 Cal.App.2d 349

HUGHES v. QUACKENBUSH et al.

Civ. 9361.

District Court of Appeal, Second District, Division 2, California.

Oct. 11, 1934.

Hearing Denied by Supreme Court
Dec. 10, 1934.

1. Appeal and error 🔑989

In reviewing judgment for plaintiff entered on jury's verdict, appellate court need not consider contradictory evidence, since jury's verdict is finding that plaintiff's version was true.

2. Appeal and error 🔑930(1)

All intendments are in favor of verdict arrived at upon conflicting testimony.

3. Appeal and error 🔑996

Where contradictory inferences can be drawn from undisputed facts, appellate court will not substitute other inferences for those of jury, though court might have reached different conclusion.

4. Evidence 🔑588

To warrant disregarding testimony as inherently improbable, there must be physical impossibility of evidence being true, or its falsity must be apparent without resort to inferences or deductions.

5. Appeal and error 🔑994(1)

Rule that appellate courts will not indulge in lengthy and dubious computations to determine whether witnesses have committed perjury is especially true in cases involving automobile accidents.

6. Appeal and error 🔑994(2)

In action for injuries in automobile accident, verdict for plaintiff would be sustained notwithstanding inconsistencies with admitted physical facts, where accident could have been caused by negligent act complained of.

7. Automobiles 🔑244(11)

Evidence sustained finding that driver of automobile colliding with automobile in which plaintiff was riding was negligent.

8. Negligence 🔑93(1)

Passenger free from negligence may recover from owner and driver of automobile negligently colliding with automobile in which she was riding, though negligence of driver of latter automobile concurred in producing injury.

9. Automobiles 🔑195(2)

Proof of allegations that minor who drove automobile negligently colliding with automobile in which plaintiff was riding was agent and employee of parents who owned automobile and signed his application for license established liability of parents (St. 1929, p. 522, § 62 (a, b, d); Civ. Code, § 1714½).

10. Automobiles 🔑242(6)

Evidence that automobile belonged to father of minor driving it at time of accident, and that minor had been at father's place of business working on automobile, created presumption that minor was driving automobile as father's agent (St. 1929, p. 522, § 62 (a, b, d); Civ. Code, § 1714½).

11. Automobiles 🔑195(6)

Under statute making owner of automobile liable for negligence of person operating it with owner's permission, owner is liable for negligence of person to whom his permittee has intrusted automobile temporarily (Civ. Code, § 1714½).

12. Automobiles 🔑195(6)

Though parents owning automobile are not liable for negligence of minor's permittee driving automobile without parents' permission, existence of agency relation between minor and parents renders both parents and minor liable therefor (St. 1929, p. 522, § 62 (a, b, d); Civ. Code, § 1714½).

13. Trial 🔑127

Attempt to bring before jury fact that driver of automobile involved in accident was insured is to be condemned only where there is avowed purpose and successful attempt to do so, and not where information comes in incidentally in attempting to prove other facts, or where particular answer was not sought or anticipated.

14. Trial 🔑127

Where driver of automobile sued for injuries arising from automobile accident stated on examination in response to question as to whether he had talked to any one after accident that he talked to insurance adjuster at police station, and where witness, in describing what took place after accident, stated that defendant said he was insured, references to insurance did not require reversal where they were stricken and jury instructed to disregard them.

15. Appeal and error 🔑1050(1)

In personal injury action, testimony of witnesses describing nature of plaintiff's work and her inability to perform it as result of injury, which incidentally disclosed her poverty, *held* not prejudicial as appeal to sympathy through direct showing of poverty.

16. Witnesses 🔑282¾

Where witness stated he had been mistaken as to matters in deposition, trial judge's questioning of witness to elicit date and circumstances of discovery of mistake *held* not error, where questioning was not lengthy or repeated or objection made thereto.

17. Witnesses 🔑393(4)
Plaintiff who used deposition of witness for purpose of impeachment could offer it in evidence in its entirety (Code Civ. Proc. §§ 2028, 2032).

18. Automobiles 🔑201(1)
In action for injuries in automobile accident, instruction that negligence of driver of automobile in which plaintiff was riding would not bar recovery against owners and driver of other automobile unless his negligence was sole cause of collision *held* proper.

19. Trial 🔑296(3)
In action for injuries against owner of automobile and his minor son alleged to be driver of automobile at time of accident, where defense was that another person was driver, instruction referring to operation of automobile by minor *held* not erroneous, where followed by instruction that question whether automobile was driven by minor was question of fact.

20. Appeal and error 🔑1064(2)
In action for injuries against owner of automobile and minor son alleged to be driver of automobile at time of accident, erroneous assumption in instruction that automobile was owned by minor *held* harmless.

21. Trial 🔑260(1)
Refusal of requested instructions given elsewhere *held* not error.

22. Automobiles 🔑201(8)
In action for injuries against owner and driver of automobile colliding with automobile in which plaintiff was riding, refusal of instructions seeking to shift responsibility for injury to driver of automobile in which plaintiff was riding *held* not error, where they lacked qualification that plaintiff might recover if injury was result of concurrent negligence of drivers.

23. Appeal and error 🔑1046(5)
Where colloquy between counsel ensued as to whether statement of driver of automobile in which plaintiff was riding that he had plenty of time to cross intersection should be stricken as conclusion, statement of court that witness thought he had plenty of time to go across if things happened in normal way, followed by striking statement, *held* not prejudicial as comment on evidence.

24. Appeal and error 🔑259, 719(1)
Appellants could not complain of alleged prejudicial comment of trial judge on evidence, where they took no exception at time and made no assignment of error.

25. Appeal and error 🔑925(3)
Where transcript of record was fragmentary, and did not show what action was taken by court when objection was made to alleged prejudicial argument to jury, appellate court would presume that action was regular.

26. Trial 🔑349(2)
Submission of special interrogatories is discretionary (Code Civ. Proc. § 625).

27. Trial 🔑349(1)
In action for injuries in automobile accident, where questions of negligence and contributory negligence were placed before jury by adequate instructions, refusal to submit interrogatories as to facts surrounding operation of defendant's automobile *held* not error (Code Civ. Proc. § 625).

28. Infants 🔑87
Failure to appoint guardian for minor who is party to action is mere irregularity, and not jurisdictional defect rendering judgment against minor void (Code Civ. Proc. § 372).

29. Infants 🔑111
Judgment obtained against minor who did not appear by guardian, being voidable only, may be disaffirmed by minor upon attaining majority (Code Civ. Proc. § 372).

30. Infants 🔑111
Where minor becomes of age during pendency of proceedings against him and continues to participate therein through counsel, his subsequent disaffirmance will not be given effect, though he was not represented by guardian (Code Civ. Proc. § 372).

31. Infants 🔑111
Minor who was defendant in personal injury action and who became of age before trial, but made no attempt to disaffirm until judgment was rendered against him, was not harmed by having case proceed against him without appointment of guardian ad litem (Code Civ. Proc. § 372).

32. Damages 🔑130(1)
Verdict may be considered excessive only when so out of proportion with injury suffered as to indicate plainly that passion and prejudice motivated jury.

33. Damages 🔑132(2)
$5,000 to 48 year old woman for fracture of collar bone which was not healed, and from which she was still suffering, at time of trial two years from injury, and which would necessitate bone grafting operation costing $2,500 to avoid permanent injury, *held* not excessive.

Appeal from Superior Court, Los Angeles County; Harry F. Sewell, Judge.

Action by Stella Hughes against John Quackenbush and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

George D. Higgins, of Los Angeles, for appellants.

George L. Greer, of Los Angeles, for respondent.

YANKWICH, Justice pro tem.

Following the verdict of a jury, plaintiff had judgment for $7,500 for personal injuries suffered by her when an automobile in which she was riding as a guest collided with an automobile owned by the defendant C. H. Quackenbush and operated by the defendant John Quackenbush, his minor son. As a condition to the denial of a motion for a new trial, the trial court reduced the judgment to $5,000. Before us is an appeal by all defendants from the order reducing it, as well as an appeal by John Quackenbush from the order denying his motion to set aside the judgment. The latter motion was based upon the ground of minority, and followed a disaffirmance made by him on April 17, 1933.

It is claimed that the evidence is insufficient to sustain the judgment, because negligence was not shown.

On January 18, 1931, the plaintiff was riding as a passenger in the automobile (a Dodge sedan) operated by Ralph W. Kerr, her son-in-law. The automobile was struck by an automobile (a Ford cabriolet) driven by John Quackenbush, owned by C. H. Quackenbush, his father. The Quackenbush automobile struck the left side of the Kerr automobile, at the left rear door, with such force as to tip it, with its four occupants. The radiator ornament of the Quackenbush automobile made a hole in the left rear door of the Kerr automobile. The Quackenbush automobile, as one witness put it, "mounted up on its side (the Kerr automobile side)." Kerr, in describing what happened at the time of the impact, stated: "When they hit they were stepping on the gas, and had so much force it raised both cars up in the air. The front wheels went up in the air, and the wheels on the left side of my car went up in the air, then they took their foot off the throttle and the cars came back on the ground again without tipping over."

At the time of the impact, the Kerr automobile was being driven in an easterly direction on Santa Monica boulevard, in the city of Los Angeles, while the Quackenbush automobile was being driven in a southerly direction on Gower street. The collision occurred in the intersection, after the front of the Kerr automobile had reached a point across the center of Gower street. The Quackenbush automobile was being driven at a speed of twenty-five miles an hour, and the Kerr automobile at a speed of fifteen miles an hour, at the time of the impact. It is admitted that John Quackenbush was in the automobile, but he denies that he actually drove it. Upon this issue, as upon many others, there is conflict. There is the positive testimony of Kerr that the automobile was driven by "the Quackenbush boy." This was also the testimony given in a deposition by Norman W. Arnos, the other young man in the Quackenbush automobile. A police officer, Thomas Maloney, testified that, after the accident, John Quackenbush gave his own name as that of the driver. The fact was also admitted in the answer. The fourth special defense, after pleading the negligence of the driver of the Kerr automobile as the sole cause of the injury, concludes with this phrase, "as to cause the same to strike and come in collision *with the automobile driven by the defendant, John Quackenbush*." (Italics added.)

As to the action of the two boys in the automobile prior to the collision, there is the testimony of Kerr that, when the Quackenbush automobile made a boulevard stop, "the two boys were sitting in the car facing each other talking," and "didn't look" at all, in the direction of the other automobile. John Quackenbush, who was driving the car, was "looking to his right, facing the boy in the seat with him." "They were laughing and talking." The testimony of Eppie Hughes Kerr is to the same effect. William Cox, who was driving an automobile behind Kerr's automobile, testified that, after the Ford automobile had stopped at the intersection, it started forward at about twenty or twenty-five miles an hour— "just jumped forward." The defendants placed in the record, for impeachment purposes, a portion of the testimony of this witness at a prior trial, in which, in describing the incident, he stated that the Ford automobile started forward, "just like a shot out of a gun."

The Kerr automobile entered the intersection first.

[1] Many of the facts just stated were disputed by the defendants. The jury's verdict in favor of the plaintiff is a finding that the version of the occurrence told by her witnesses is true. So, in stating the evidence for the

purpose of this opinion, we need not take into consideration the instances wherein these witnesses were contradicted by others, or even wherein they may have contradicted themselves. That conflict was for the jury to resolve. From these facts, it was easily inferable that the young men had been too busy talking to each other to observe the other automobile and had darted heedlessly into the intersection, oblivious of the ordinary rules of caution.

[2-4] All intendments are in favor of the verdict of a jury arrived at upon conflicting testimony. Even when the facts are undisputed, if contradictory inferences can be drawn from them, an appellate court will not substitute other inferences for those of the jury. Ketelhut v. Gunther, 100 Cal. App. 409, 279 P. 1083; Coats v. Hathorn, 121 Cal. App. 257, 8 P.(2d) 1038. This is the rule even where the reviewing court might have reached a different conclusion. Conness v. McCarty, 216 Cal. 415, 14 P.(2d) 507; Foxe v. Southern Pacific Co., 121 Cal. App. 633, 9 P.(2d) 514; McGlothin v. Larussa, 122 Cal. App. 324, 10 P.(2d) 116. Of course, testimony which is inherently improbable may be disregarded. Neilson v. Houle, 200 Cal. 726, 254 P. 891. But to warrant such action there must exist either a physical impossibility of the evidence being true or its falsity must be apparent, without any resort to inferences or deductions. Powell v. Powell, 40 Cal. App. 155, 180 P. 346, 348; Stahmer v. Stahmer, 125 Cal. App. 132, 13 P.(2d) 833. As said in Powell v. Powell, supra:

[5, 6] "The appellate court will not indulge in lengthy and dubious computations, nor seek far for a reason, no matter how ingenious may be the argument by which it is urged, to determine that witnesses have committed perjury. It is its duty, if possible to harmonize apparent inconsistency in their statements, and to do this it will indulge in every reasonable presumption of fact."

This is especially true in automobile accidents. Modern psychological experiments have shown that, due to the quickness with which an accident happens, those who see it, and those who participate in it, may not get clear impressions. If, after trial, an appellate court attempted to weigh every one of these impressions which may seem contradictory, by the rules of the exact sciences, few verdicts could stand. In Neilson v. Houle, 200 Cal. 726, 728, 254 P. 891, the court quotes with approval a rather lengthy excerpt from the opinion of this court in Austin v. Newton, 46 Cal. App. 493, 189 P. 471, 474, written by Mr. Presiding Justice Finlayson, which contains the following language:

"It is not to be supposed that witnesses to an accident that happens in the twinkling of an eye should accurately observe all the details. Much less is it probable that one who is injured in the accident, and rendered unconscious, should be able to give a correct account of all the quickly happening events. It cannot be laid down as a rule of law that a plaintiff in a personal injury case cannot recover unless the court can see that every detail of the accident, as testified to by the plaintiff and his witnesses, is consistent with admitted physical facts and the laws of science. Undoubtedly where some of the details of an accident, as described by a witness, conflict with admitted physical facts, the whole story of the accident, as given by that witness, may be entirely discredited; but, as an appellate court, we cannot reverse unless we can say that the admitted physical facts are wholly irreconcilable with the negligence alleged in the complaint. To entitle respondent to an affirmance, it is sufficient if it can be said that, notwithstanding the admitted physical circumstances, the accident could have been caused by the negligence charged in the complaint. We hold that the reasonableness of plaintiff's version of the accident was a question of fact for the trial court, and that its finding thereon is conclusive here." See Finch v. Willmott, 107 Cal. App. 662, 666, 290 P. 660.

If, notwithstanding inconsistencies and admitted physical facts, the accident *could have been caused* by the negligent act of which the plaintiff complains, the verdict of the jury will be sustained. See Wickman v. Lowenstein et al., 136 Cal. App. 282, 28 P.(2d) 681.

[7] The evidence in the record, which we have read in full from the reporter's transcript, the appellant having attached a portion of it only to the brief, warranted the conclusion that there was negligence in the operation of the Quackenbush automobile.

[8] Counsel for the defendants attempt to discredit the witness Kerr and charge him with various negligent acts. If the negligence of Kerr and Quackenbush concurred in the result, the plaintiff, as a passenger, who was free from negligence, may nevertheless recover from the defendants. Kelley v. Hodge Transportation System, 197 Cal. 598, 242 P. 76; Fishman v. Silva, 116 Cal. App. 1, 7, 8, 2 P.(2d) 473.

Starting with the statement of Kerr that his automobile entered the intersection first, counsel for the plaintiff attempt to demonstrate, by mathematical computation, and by the experiments of some of the witnesses, that the statement (and others based upon it) could not possibly be true. They would therefore discredit his entire version of the transaction. The argument, we feel, is one which might more readily have been (and, no doubt, was) addressed to the jury which heard the case rather than to a reviewing court.

[9] The sufficiency of the evidence to sustain the verdict and judgment is also attacked upon the ground that the action was based upon the provisions of section 62 of the California Vehicle Act (St. 1923, p. 532, as amended by St. 1929, p. 522) covering the liability of parents for the negligence of their minors, whose applications for license they sign. It is argued that the testimony shows that John Quackenbush was the owner of the car. From this premise, it is argued that the father could not be liable. Then it is argued that the minor is not liable because he was not driving the automobile and the driver was not shown to have driven the car under his (the minor's) license. The argument overlooks the fact that the complaint, while alleging the signing of the application by the parents, C. H. Quackenbush and Jennie Quackenbush, also alleged that John Quackenbush was the agent and employee of "the defendants." This allegation, if proved, was sufficient to establish liability either under subdivision (d) of section 62 of the California Vehicle Act, or section 1714½ of the Civil Code.

[10] There was testimony which tended to prove that the automobile belonged to the elder Quackenbush, and that young Quackenbush operated it, at the time of the accident. He and his young friend had been at C. H. Quackenbush's place of business, working on the automobile. These facts were sufficient to create a presumption of agency, and justified the inference that the son was using the automobile as the agent of the father. Perry v. McLaughlin, 212 Cal. 1, 14, 297 P. 554.

[11] Section 1714½ of the Civil Code makes the owner liable for the negligence of any person using and operating his automobile with his implied or express permission. Our courts have held the words of the section broad enough to make the owner liable for the negligence of a person to whom his permittee has intrusted the automobile temporarily. Sutton v. Tanger, 115 Cal. App. 267, 1 P.(2d) 521; Pohle v. Bolinas Beach Realty Co., 130 Cal. App. 704, 20 P.(2d) 730. Courts elsewhere have interpreted provisions in similar statutes in a similar manner. See Kerns v. Lewis, 246 Mich. 423, 224 N. W. 647; Arcara v. Moresse, 258 N. Y. 211, 179 N. E. 389.

[12] And, while it is true that a parent cannot be held liable under the provisions of subdivisions (a) and (b) of section 62 of the California Vehicle Act if the car is driven by the minor's permittee without the parent's permission (Lundquist v. Lundstrom, 94 Cal. App. 109, 270 P. 696; Bradford v. Sargent, 135 Cal. App. 324, 27 P.(2d) 93), where, *as here*, agency exists, the liability exists whether under subdivision (d) of section 62 of the California Vehicle Act or under section 1714½ of the Civil Code. And it attaches to the minor as well as to the parent.

The claim of insufficiency of the evidence based upon this ground must therefore fall.

[13, 14] Appellants assign as error certain rulings and actions of the court, relating to the admission of testimony, the conduct of the trial, and the giving and refusal of instructions. While being examined by counsel for the plaintiff, under the provisions of section 2055 of the Code of Civil Procedure, the defendant John Quackenbush was asked whether, at the police station, "he had talked to anyone." To which he answered: "I had a talk with the insurance adjuster at the time." The answer was stricken upon the motion of the defendant and the jury instructed to disregard it. One of plaintiff's witnesses, William Cox, while describing what took place after the accident, stated that he asked the defendant if he was insured, and that the defendant had replied affirmatively. This reference to insurance was also stricken, and the jury instructed to disregard it. While courts have condemned repeatedly attempts to bring before a jury the fact that insurance exists, their condemnation extends only to cases where there is an "avowed purpose and successful attempt" to bring the fact before the jury. It does not extend to cases where the information comes in, incidentally, in attempting to prove other facts, or where the record does not show that the particular answer was sought or anticipated. Citti v. Bava, 204 Cal. 136, 266 P. 954; Hodge v. Weinstock, Lubin & Co., 10 Cal. App. 393, 403, 293 P. 80. And see Dermer v. Pistoresi, 109 Cal. App. 310, 315, 29 P. 78.

The answers to which objections were made here come within these exceptions.

[15] Defendants complain that the plaintiff brought before the jury the fact of her poverty. Such fact, of course, is not admissible.

Steinberger v. California Electric Garage Co., 176 Cal. 386, 391, 168 P. 570; Perez v. Crocker, 86 Cal. App. 288, 292, 260 P. 838; Crabbe v. Rhoades, 101 Cal. App. 503, 513, 282 P. 10. However, an examination of the testimony elicited from the witnesses on the subject shows that they were merely describing the nature of the plaintiff's work, the fact that she had the care of a child, and that, as a result of the disability, she was unable to perform certain acts. These facts bear clearly upon the extent of the injury. If incidentally they also disclosed her humble status and the salary she was receiving, the result was incidental and such as could not be avoided. This is not the appeal to sympathy through a direct showing of poverty which courts denounce.

[16] One of the defendants, Norman Arnos, having stated that he had been mistaken concerning certain matters in a deposition, the court asked several questions aimed to elicit from the witness the date and circumstance of the discovery of the mistake in the deposition. We see no error in this action. It is the rule, even in criminal cases, that the trial judge may, by proper questions, seek to clarify a fact or to elicit the truth. Atchison v. Hulse, 107 Cal. App. 640, 645, 646, 290 P. 916; People v. Golsh, 63 Cal. App. 609, 614, 219 P. 456; People v. Knocke, 94 Cal. App. 55, 61, 270 P. 468. Of course, when the examination is of unusual length, and is without apparent necessity, courts condemn it. People v. Boggess, 194 Cal. 212, 228 P. 448; People v. Keys, 82 Cal. App. 602, 255 P. 897. The examination in the instant case related to an evident contradiction between the testimony of the witness given at the trial and his testimony given in the deposition. It does not seem to have been lengthy or repeated. Furthermore, the defendants interposed no objection. Hence they are not in a position to complain. People v. Reid, 72 Cal. App. 611, 618, 237 P. 824; Atchison v. Hulse, supra.

[17] The deposition of the same witness, Norman Arnos, who resided out of the state, was taken. Arnos (as already stated) was present at the trial and testified as a witness for the defendant. After using the deposition for the purpose of impeachment, the plaintiff, over the objection of the defendants, offered it in evidence. The deposition of a witness out of the state is not subject to the limitations which apply to some of the depositions of a witness within the state. See Code Civ. Proc. § 2032. Such deposition may be used by either party. Code Civ. Proc. § 2028. The fact that the deposition was first used for impeachment did not deprive the plaintiff of the right to offer it in its entirety.

The rather extended discussion of facts which precedes makes it unnecessary to discuss in detail the criticisms of the instructions given by the court. Many of these criticisms are based upon conclusions as to facts which go counter to the conclusions reached by the jury, upon contradictory testimony. We have read the instructions as a whole. They state fully and correctly the law of the case.

[18] Referring more particularly to the instructions excepted to, we find no error in the instruction which stated that the negligence of Kerr would not bar recovery, "unless his negligence, if there was any, was the sole and only cause of the collision between the automobiles." This was a correct statement of the law, in simple language. Fishman v. Silva, 116 Cal. App. 1, 7, 8, 2 P.(2d) 473.

[19, 20] Several instructions are complained of because they referred to "the operation" of the automobile by John Quackenbush. They were followed by an instruction given by the court of its own motion, in which the question whether the automobile was actually driven by John Quackenbush was submitted to them as a question of fact. This instruction stated correctly the liability arising out of the relationship between the boy and his father. The erroneous assumption in it that the automobile was owned by John Quackenbush was harmless. The court stated correctly the rule as to the right of way at intersections, in the language of the California Vehicle Act.

[21, 22] Some of the instructions requested by the defendants which were refused were given elsewhere. Others which sought to shift the responsibility for the injury upon the driver of the Kerr automobile did not state the law correctly. They lacked the qualification that recovery might be had even if the negligence of the defendants merely contributed to the injury, or the injury was the result of the concurrent negligence of the driver of the automobile in which the plaintiff was a passenger and the defendants. Springer v. Pacific Fruit Exchange, 92 Cal. App. 732, 738, 739, 268 P. 951; Fishman v. Silva, supra.

[23, 24] Certain remarks of the court are assigned as misconduct. During the examination of the witness Kerr, he stated: "Well, I was driving along the car tracks and saw them pull up and stop. I kept right on going, because I had plenty of time to go across." Counsel for the defendant requested that the statement "I had plenty of time to go across" be stricken. Argument between counsel ensued, the plaintiff's counsel arguing that the statement was not a conclusion, while the counsel for the defendants insisted that it was. The court thereupon commented: "The witness evidently thought he had plenty of time to go across if things had happened in the normal way. It does involve a conclusion, however." Thereupon the court ordered the statement stricken. It is evident that the court was not commenting upon the evidence, but was merely restating the substance of the testimony, in order to determine whether it was a conclusion. When it struck the statement as given by the witness, its action carried the restatement also. Furthermore, no exception having been taken by the defendants at the time, or assignment of error made, they cannot complain. Hughes v. Duncan, 114 Cal. App. 576, 579, 300 P. 147; Simpson v. Steinhoff, 131 Cal. App. 660, 664, 21 P.(2d) 960.

[25] During the course of the argument, counsel for the plaintiff referred to the fact that he could not offer a certain police report, and added: "They can produce it if they want to." Whereupon the following colloquy took place:

"Mr. Higgins (counsel for the defendants): I object to that statement at this time as prejudicial to the case of the defendant, and not a statement of the evidence, not an argument on the evidence. I ask the court to instruct the jury to disregard it.

"Mr. Greer (counsel for the plaintiff): May I suggest that, where one side may produce evidence, which it lies within their sole power to produce, presumptively, that evidence, if produced, is against them.

"The Court: *That is true.*" (Italics added.)

It may be conceded that, the police report being inadmissible, the defendants were not under any obligation to produce it, and that their failure to do so could not be considered as a suppression of evidence. But the court's comment was addressed to the general statement of Mr. Greer. No exception was taken, and it was not, at the time, assigned as error. The transcript does not disclose what the court did about the remark of counsel. The plaintiff has brought up a fragmentary portion of the record only, which does not contain the argument which preceded, or what followed it. There is not before us any record of the granting or denial of the motion to strike. The presumption being in favor of regularity, we must indulge in it. when confronted with a partial record of the matters which surrounded the incident complained of. Filmer v. Davis, 91 Cal. App. 195, 200, 266 P. 985.

[26, 27] The defendants complain of the refusal of the trial court to submit seven interrogatories. These sought to secure special findings as to which of the two cars entered the intersection first; whether the plaintiff was driving close to the curb; and, if not, whether it was impracticable, and why, to travel upon the right side of the highway; whether the defendant made a complete stop before entering the intersection; in what gear the defendant's car was being operated; whether the driver of the defendant's car was guilty of negligence; and, if so, what acts or omission constituted such negligence. The submission of special interrogatories is discretionary. Code Civ. Proc. § 625; Estate of Witt, 198 Cal. 407, 426, 245 P. 197; Oberholzer v. Hubbell, 36 Cal. App. 16, 19, 171 P. 436; De Martini v. Wheatley, 126 Cal. App. 230, 14 P.(2d) 869. As the questions of negligence and contributory negligence were placed before the jury, by adequate instructions, the court did not abuse its discretion in refusing to submit the interrogatories or any of them. More, the interrogatories might have caused confusion in the minds of the jurors. The defendant John Quackenbush was a minor up to and including February 16, 1933. He appeared in the case personally, through counsel. He had no general guardian, and was not represented by a guardian ad litem. On April 13, 1933, he disaffirmed the judgment. The trial court declined to give effect to this disaffirmance and to set aside the judgment as to him.

[28-30] It is elementary that, when a minor is a party to an action, he must appear either by his general guardian or by a guardian ad litem appointed by the court for that purpose. Code Civ. Proc. § 372. The failure to appoint a guardian is a mere irregularity; it is not a jurisdictional defect which renders the judgment void. Childs v. Lanterman, 103 Cal. 387, 390, 37 P. 382, 42 Am. St. Rep. 121; Johnston v. Southern Pacific Co., 150 Cal. 535, 539, 89 P. 348, 11 Ann. Cas. 841. The judgment being voidable only, it may be disaffirmed by the minor upon his attaining majority. Gouanillou v. Industrial Accident Commission, 184 Cal. 418, 193 P. 937; Neilson v. Walker, 105 Cal. App. 23, 286 P. 1091; Field v. Hughes, 131 Cal. App. 144, 20 P.(2d) 990. If the minor becomes of age during the pendency of the proceedings and continues to participate therein, through counsel, his subsequent disaffirmance will not be given effect.

This upon the theory that his failure to disaffirm the judgment promptly amounts to laches, and indicates that he has suffered no loss of substantial rights by not being represented by a guardian: Johnston v. Southern Pacific Company, supra; King v. Wilson, 116 Cal. App. 191, 2 P.(2d) 833; Carver v. Donin (Cal. App.) 33 P.(2d) 841.

The justice of this rule is evident. The minor who reaches majority while a case against him is in progress should not be allowed to speculate upon the outcome, and then, if it be unfavorable, be relieved of its effect.

[31] This is what occurred here: The minor was represented by the same counsel as his parents throughout the proceedings. He became of age on February 16, 1933. The trial was had February 21 to 27, 1933. The verdict was rendered on February 27, 1933. The notice of intention to move for a new trial was filed March 9, 1933. The disaffirmance occurred on April 13, only three days before the motion for a new trial was actually heard and determined by the court. Under the circumstances, we feel that John Quackenbush has not been harmed by having the case proceed against him without the appointment of a guardian ad litem, and that his laches in failing to disaffirm promptly, after attaining majority, bar him from questioning the judgment.

The defendants, while objecting to the reduction of the verdict by the court, as a condition of denying a new trial, now complain that the verdict in the reduced amount is nevertheless excessive.

[32, 33] At the time of the accident the plaintiff was forty-eight years old. She suffered a fracture of the left clavicle or collar bone. Following the accident, she suffered great pain in the left shoulder. She was unable to sleep for three weeks without taking opiates. At the time of the trial, two years after the accident, she was still suffering from the effects of the injury. The fracture had not healed. An orthopaedic surgeon, Dr. John C. Wilson, testified that an operation (bone grafting) was necessary, which might or might not be successful, and that such an operation might cost $2,500. Otherwise the injury would be permanent. While the plaintiff had partial use of the arm, at the time of the trial she could not lift it above a certain position. She could not sleep on the left side of her body. Even in doing ordinary housework she could not lift a quilt with the left hand, but had to use both hands. She could not turn a mattress at all. At the time of the accident she was receiving $50 a month for the work she was doing, hotel maid work, and board for herself and child.

Only those verdicts may be considered excessive which are so out of proportion with the injury suffered as to indicate plainly to the reviewing court that passion and prejudice motivated the jury in awarding the amount. McGlothin v. Larussa, supra; Barrett v. Harman, 115 Cal. App. 283, 288, 1 P.(2d) 458.

The trial court, in the possession of visual facts relating to the extent of the disability which the word descriptions in the printed record do not reproduce graphically or adequately, in the exercise of its discretion reduced the amount to $5,000. We cannot say that this amount is excessive.

The record being free from prejudicial error, the judgment and order are affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

In re GOLDEN'S ESTATE *

LINSTEAD v. STODDARD.

Civ. 5117.

District Court of Appeal, Third District, California.

Oct. 19, 1934.

Rehearing Denied Nov. 17, 1934.

Hearing Granted by Supreme Court Dec. 17, 1934.

1. Wills 🔑270

That citation of contest of will was not properly served on all heirs and that all parties interested were not before court did not divest court of jurisdiction to hear and determine contest between parties properly before it, although judgment would not be binding upon interested persons who were not properly served with citation until after lapse of six months after probate was granted, during which time validity of will could be contested (Probate Code, §§ 370, 380–382).

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*For subsequent opinion see 48 P.2d 962.

2. Wills 🔑270

Statutory requirement that citation of contest of will be served personally or by publication in manner provided by law for service of summons in civil actions was not met by service of citation of time and place of hearing of contest by mail (Probate Code, §§ 370, 380–382).

3. Evidence 🔑271(19), 318(2)

In proceeding to revoke probate of holographic will, proponent of will could prove receipt of letter from attorney in reply to his letter that he had holographic will of deceased, but could not prove contents of letter (Code Civ. Proc. § 2055).

4. Appeal and error 🔑1060(1)

Challenge of attorney to opposing litigant to call witness whom he knew to be intoxicated *held* not prejudicial misconduct.

5. Wills 🔑229

Public administrator is not such an "interested person" as would entitle him to contest will (Probate Code, §§ 370, 380).

[Ed. Note.—For other definitions of "Interest" see Words & Phrases.]

6. Wills 🔑229

Brother of deceased is such an "interested person" as is entitled to contest will (Probate Code, §§ 370, 380).

7. Wills 🔑269

That deceased's brother living 2,000 miles away had 18 days' notice of petition to probate will did not preclude him from contesting will after it had been admitted to probate, since notice under circumstances did not as matter of law give sufficient time to contest original probate (Probate Code, § 380).

8. Wills 🔑423

That public administrator contested probate of will did not preclude brother of deceased from subsequently contesting will, because contest by public administrator was not valid contest, so that, in proceeding by brother to contest, refusal to submit special issues as to whether brother had actual knowledge of previous contest was proper (Probate Code, § 380).

9. Wills 🔑423

Order admitting will to probate was not res judicata so as to bind brother and preclude him from maintaining subsequent petition to revoke probate, where there had been no valid previous contest of will (Probate Code, § 380).

10. Wills 🔑384

In proceeding to revoke probate of holographic will, in which evidence preponderated strongly in favor of genuineness of will and against special findings of jury, judge's language in presence of jury inferring that he believed will was forged *held* reversible error, although language was uttered with innocent purpose (Probate Code, § 380).

11. Appeal and error 🔑903

Record should be construed on appeal acording to established rules of law so as to insure litigants fair and impartial trial if possible.

12. Wills 🔑1

Testator who is of sound mind and free from undue influence has absolute right to dispose of his property by will as he desires.

13. Appeal and error 🔑201(2), 207

Assignment of conduct of judge or of counsel as prejudicial requires objection to be made in course of trial so as to afford trial judge opportunity to correct prejudicial impression, except where challenged statements are of such nature that their effect may not be cured by explanation or by instructions to jury.

Appeal from Superior Court, Mendocino County; Hilliard Comstock, Judge.

Petition by W. J. Linstead to revoke probate of holographic will of George Golden, deceased, opposed by E. T. Stoddard. From a judgment denying probate, E. T. Stoddard appeals.

Reversed.

Taft & Spurr, of Ukiah, for appellant.

Hale McCowen, Jr., of Ukiah, for respondent.

PER CURIAM.

This is an appeal from a judgment rendered pursuant to the special findings of a jury setting aside a previous order admitting a holographic will to probate, on the ground that the alleged will is a forgery.

George Golden, whose real name was George Linstead, died in Mendocino county February 29, 1932, possessed of real and personal property valued at about $25,000. His wife died long prior to the execution of the holographic will which is here involved. He left no heirs except three brothers, who reside in Montana, one of whom is the contestant herein, and Margaret Hauser, a niece, who lives in San Francisco. Golden left the East many years ago with another man's wife, and changed his name on that account. He had been a resident of Fort Bragg and was prominent in business and politics in Mendocino county for more than thirty-five years. E. T. Stoddard was also a resident of Fort Bragg and was prominent in that community in business and politics during that period of time. He was successively a contractor, the manager of a stage route and of a gas station on the Redwood highway. He possessed a good reputation and was a close personal friend of Golden for thirty-five years prior to the death of the testator. In September, 1931, after the death of his wife, Mr. Golden suffered a stroke of paralysis and was afflicted with diabetes. He told Joseph Olinsky, a friend of his, in the summer of 1931, that "he had some brothers in Montana and a niece somewhere about the Bay there, but he had been out of touch with them for a good many years, and they meant nothing to him; that was after his wife had died. And, he said he did not expect to leave his relatives anything. That he had some good friends, Dave Miller and Ed Stoddard, and that he would leave his property to them." Stoddard was in communication with his friend Golden up to within six months of his death. Stoddard testified that he drove in his automobile to the Piercy post office, about four miles from his gas station, on January 20, 1932, where he received by mail the will and a letter from Golden, which he examined and "put them in a leather pouch in which I carry my mail and placed them in the front seat of my automobile." He also claimed to have received another typewritten letter from Golden, which he carried into his gas station and placed on the cash register, but afterwards destroyed it. This was before the death of Golden. When he afterwards looked for the will and accompanying letter from Golden, he failed to find them. He searched in vain for them, and concluded he must have lost them. He did not tell his wife about the lost will until about March 3, 1932, after he learned of the death of Golden. The holographic will and accompanying letter purport to be in the handwriting of Golden, and are in the following language:

"Nov. 27th, 1931.

"For and in consideration of the friendship and friendly love for E. T. Stoddard and for other considerations that has existed for the last twenty five years it is my last will to give and grant unto E. T. Stoddard one half of my estate at the time of my death any thing it may consist of at that time.

"Geo. Golden."

"Fort Bragg, Cal. 1/18/32.

"Mr. Ed. Stoddard, Piercy, Cal.

"Dear Ed. Pleased to hear you are in good health. My sick spell hangs on like the devil and dont get any better. No dident expect you over as it has been raining all the time cold as the mischief. Now Eddie inclosed find document for you and should any thing happen to me you will have same.

"Wishing you all the best of good luck let me hear from you.

"Geo. Golden."

The preceding letter is not included in the bill of exceptions. Soon after the death of Mr. Golden, Austin Smith was riding in May, 1932, with Mr. Stoddard in his automobile when they were forced to stop because of a flat tire. He testified that he lifted the cushion of the front seat to procure some tools with which to repair the flat tire, when a mouse jumped out. He said: "I rummaged around for the pump and got it out and while I was pumping up the tire a mouse ran out of the car. When Ed came over there I said 'Ed, do you know there are mice in your car? I saw one run out.' Then he went to looking in the car and pulled out the front cushion, and a leather pouch fell out and the contents came out and fell to the ground. I started to pick them up and handed him an envelope. He said, 'That's the thing I have been looking for for sometime.' He opened it up and I looked at it. It was a will signed by George Golden and a letter. I identify Exhibits 10 and 11 as being the same documents. We went over to the store and I got a sandwich and was eating the same at the counter and looking at the will."

Mr. Golden died February 29, 1932. Stoddard did not learn of his death until March 3d. He searched for the will, but did not find it, as above related, until the following May. In the meantime he told his wife of the lost will and also informed Leonard Stone, an attorney at Fort Bragg, of that fact. There is substantially no conflict of evidence regarding the foregoing facts, except the circumstances which will be hereafter related.

Upon petition therefor, the public administrator of Mendocino county was appointed and qualified as administrator of the estate of George Golden, deceased. After the discovery of the will, it was filed May 9, 1932. On petition of E. T. Stoddard, it was admitted to probate May 27, 1932, and Margaret L. Hauser, the niece of deceased, was appointed and qualified as administratrix with the will annexed of the estate of George Golden, deceased. October 10, 1932, W. J. Linstead, of Montana, a brother of the deceased, filed a petition to revoke the probate of the holographic will on the sole ground that the document is not in the handwriting of the deceased. An answer to this petition was filed by the legatee, E. T. Stoddard. The cause was tried with a jury. Special issues were submitted to the jury, which found that the purported will dated November 27, 1931, was neither written, dated, nor signed by the hand of George Golden. A general verdict was also returned in favor of the plaintiff. Pursuant to the special findings and general verdict of the jury, the court rendered judgment February 2, 1933, revoking the letters of administration theretofore issued to Margaret Hauser, and denying probate of the will. From this judgment E. T. Stoddard has appealed.

It is contended the probate court was without jurisdiction to hear or determine the petition to revoke the probate of the will, for the reason that all of the persons interested in the estate were not parties to the contest; that the former order of court made on May 27, 1932, admitting the will to probate, is res judicata for the reason that the petitioner, W. J. Linstead, had full knowledge of that proceeding; that the judgment is not supported by the evidence; that the trial judge and counsel for the petitioner in this proceeding were guilty of prejudicial misconduct; and that the court erred in rejecting competent evidence.

[1, 2] The court properly denied the appellant's motion to dismiss the petition to revoke the probate of the will. This motion was made on the ground that the court was without jurisdiction to hear and determine the contest of the will for the reason that the citation had not been served upon all heirs of the deceased, as required by sections 381 and 382 of the Probate Code, and that the interested parties were not all represented in the proceedings. It is true that the citation of the time and place of hearing the contest was served upon the brothers of the deceased who reside in Montana only by mail. This does not conform to the requirements of section 370 of the Probate Code, which directs the citation to be served "personally or by publication in the manner provided by law for the service of summons in civil actions." Two of the brothers of the deceased failed to appear in the contest of will. Personal service was made on the sole devisee of the will, Stoddard, and upon Margaret Hauser, the administratrix with the will annexed. The petition to revoke the probate was filed and prosecuted by W. J. Linstead, one of the brothers of the deceased. The proponent of the will might have moved to continue the contest until other proper parties were brought into the proceeding. Other heirs and interested parties are, however, precluded from contesting the will under the provisions of section 380 of the Probate Code for failure to file their petition to revoke the probate within six months after the will was admitted to probate.

This defect of service of the citation did not divest the court of jurisdiction to hear and determine the contest between the parties who were properly before the court.

It has been held that "the trial court was without jurisdiction to proceed with a hearing of the contest for the reason that the citation mentioned in sections 1328 and 1329 [now sections 381 and 382, Probate Code] of the Code of Civil Procedure was not served upon all the legatees under the will." In re Estate of Visaxis, 95 Cal. App. 617, 273 P. 165, 167. In the case last cited the court further says: "We can see no reason why a will contest should not proceed as between the contestant and those upon whom the citation is served. It is settled that jurisdiction over a will contest attaches upon the filing of the petition. In re Estate of Maescher, 78 Cal. App. 189, 248 P. 537."

A petition for hearing in that case was denied by the Supreme Court. It follows that the trial court had jurisdiction in the present proceeding to hear and determine the petition to revoke the probate of the will, between the parties who appeared in court, in spite of the fact that all of the parties interested therein were not before the court, although the judgment would not be binding upon such heirs or interested persons who were not properly served with citation until after the lapse of six months after probate was granted, during which time they were permitted to contest the validity of the will.

[3] The court did not err in sustaining the respondent's objection to an offer on the part of the appellant to rehabilitate the testimony of Mr. Stoddard with respect to a statement that he had written Attorney Leonard Stone a letter telling him that he had a holographic will which was executed by George Golden. While Stoddard was being examined by the respondent under the provisions of section 2055 of the Code of Civil Procedure, he was asked if he had ever told any one, other than his wife, that he had the holographic will of Golden. Stoddard replied that he had written Attorney Stone to that effect. He was then asked if Stone had replied to that letter. Stoddard said that Stone had written to him, but that he had destroyed his letter. Subsequently, when Leonard Stone became a witness in behalf of the appellant, he was

asked if he had received a letter from Mr. Stoddard regarding the will. An objection to this question on the ground that it was incompetent, hearsay, and self-serving, was sustained, for the reason that the appellant sought to prove the contents of the letter, rather than the mere fact that Stone had received such a letter. Mr. McCowen, attorney for contestant, said: "If all you want to prove by this witness is the receipt of a letter from Mr. Stoddard, our objection will be withdrawn." Attorney Taft replied, "We expect to prove the contents of that letter." It is therefore clear that the objection was sustained on the theory that the appellant sought to prove the contents of the letter rather than the mere receipt thereof. That would have been self-serving and hearsay evidence. He did have a right to prove that Stone received a letter from him concerning the will. Davis v. Tanner, 88 Cal. App. 67, 262 P. 1106. But that privilege was not denied him. The court correctly ruled that the appellant was not entitled to prove the contents of the letter.

[4] We are unable to say that the challenge of the attorney for contestant to the appellant to call a witness whom he knew to be intoxicated was prejudicial misconduct. The witness was called and examined, and his evidence was favorable to the appellant. If his evidence was discredited because of his intoxicated condition, the record fails to disclose that fact.

We are of the opinion the court properly denied the appellant's motion to dismiss the petition of W. J. Linstead to revoke the former order admitting the will to probate. The motion was made on the ground that the brother was precluded from maintaining the proceeding under the provisions of section 380 of the Probate Code because he had actual knowledge of Stoddard's petition to probate the will a short time after it was filed. Section 380 of the Probate Code provides: "When a will has been admitted to probate, any interested person, other than a party to a contest before probate and other than a person who had actual notice of such previous contest in time to have joined therein, may, at any time within six months after such probate, contest the same or the validity of the will."

[5] The will was filed May 9, 1932. The petition to probate it was filed by Stoddard on the same day. The original contest to the probating of the will was filed May 23, 1932, by the public administrator. The public administrator was not such an "interested person" as would entitle him under the provisions of sections 370 or 380 of the Probate Code to contest the will. In re Estate of Sanborn, Deceased, 98 Cal. 103, 32 P. 865, 866. In the case last cited it is said: "A public administrator has no interest in an estate, or in the probate of a will. That is a matter which concerns only those to whom the estate would otherwise go."

[6, 7] W. J. Linstead is a brother of the deceased, and is therefore interested in the estate so as to entitle him to maintain a contest to the will or a petition to revoke the probate thereof after it had been admitted, pursuant to the provisions of section 380 of the Probate Code. He lives in Montana. He did not know of the petition to probate the will until after May 9th, when it was filed. It was actually admitted to probate eighteen days later, on May 27th. In the absence of evidence to the contrary, we are unable to say, as a matter of law, that eighteen days' notice to one who lives 2,000 miles away in Montana is sufficient time to have enabled him "to join therein." There is no evidence that Linstead knew when the petition for probate of the will would be heard. Moreover, since the public administrator was not entitled to maintain a contest to the will, it may not be said there was a valid contest of the will which would preclude Linstead under section 380 of the Probate Code from subsequently petitioning the court to revoke the probate thereof.

[8] For the reason that there was no valid contest of the will by the public administrator which would preclude Linstead from maintaining a subsequent contest thereof under section 380 of the Probate Code, the court properly refused to submit to the jury the special issue which was proposed by the appellant in the following language: "Did W. J. Linstead have actual knowledge of the probate of the will on May 27th, 1932, and the contest raised by the pleadings filed by E. T. Stoddard, W. F. Ornbaun and Margaret Holt Hauser?" Margaret Hauser was not a contestant of the will. She was a proponent of the will, and merely asked that she be appointed administratrix with the will annexed in the event that the will was admitted to probate.

[9] For the reasons heretofore assigned, the order admitting the will to probate on May 27, 1932, was not res judicata so as to bind W. J. Linstead thereby and preclude him from maintaining a subsequent petition to revoke the probate of the will under the provisions of section 380 of the Probate Code.

[10] In view of the fact that the evidence appears to preponderate strongly in favor of the genuineness of the will and against the special findings of the jury, we are of the opinion the challenged language which was uttered by the judge in the presence of the jury, inferring that he believed the will was forged, was prejudicial to the appellant, and that it constitutes reversible error. It is contended the impression which was conveyed to the jury from these statements of the judge was that he believed the will and accompanying letter were "a part of a fraudulent scheme" on the part of Stoddard to forge the instruments, and that he "mailed them to himself during the illness of Mr. Golden, or had a confederate mail them to him" for the wrongful purpose of procuring a part of the estate, and that he discredited the testimony of Stoddard for the reason that it contained "inconsistencies as to the destruction" of the typewritten letter which the witness said that he had also received from the testator.

The challenged statements were made in the following manner: Counsel for the contestant of the will was examining Stoddard under the provisions of section 2055 of the Code of Civil Procedure. He had been questioning the witness regarding the contents of this typewritten letter which Stoddard said he placed on his cash register and afterwards destroyed. He said he did not recall the contents of the letter except that it contained "some things that had happened between" himself and Golden which the deceased wanted to keep secret. His attention was then called to an alleged discrepancy between that statement and a former one which was contained in a printed transcript. To this evidence the attorney for the appellant objected. Contestant's counsel then said the comparison of the statements of the witness is important because Stoddard said that Golden "sends him two letters reaching him at the same time and he destroys one and, according to his testimony, one set of facts existed at the former hearing, and now we maintain he is testifying to some other thing different." The following colloquy on that subject occurred:

"The Court: You contend, Mr. McCowen, of course, that this will and the letter which accompanied it, and the envelope in which it was received, were all a part of the fraudulent scheme, and were all a part of one forgery, do you not?

"Mr. McCowen: Yes, your Honor.

"The Court: And consequently, the basis of that contention must be that either the witness Stoddard mailed it to himself during the illness of Mr. Golden, or had a confederate mail it to him, and that the letter which was received at the same time would contain absolutely inconsistent material?

"Mr. McCowen: Yes, your Honor.

"The Court: And [the typewritten letter] was one of the true authorship of George Golden. Well, I think the destruction of that letter, under the theory counsel is proceeding under, the destruction of it and all circumstances connected with the destruction of it, including inconsistencies as to the destruction of it, are material."

Furthermore, the court interrupted the cross-examination of Chauncey McGovern, the handwriting expert who had been trying to support his opinion that the will was genuine by a comparison of the handwriting contained in the will and letter with acknowledged exemplars of the genuine handwriting of the deceased. The court said:

"Before you leave the subject of that 'G'; when you find in a questioned document a number of 'G's' occurring in the middle and all finished with a straight down stroke and no loop, and you find in the admitted documents the 'G' finished with a loop in all cases, except where it is a double 'G' in the words 'Fort Bragg,' does that not convey to you some suspicion of the genuineness of the suspected document? A. Yes, if that's the only thing I observed, but when I observed that and observed many other things on the other side—

"The Court: But it does convey to you a suspicious circumstance which has been overcome by a preponderance of other facts?"

On further cross-examination of this same witness, counsel for the contestant was asking if it were not a suspicious fact that a penman varied from his usual habit in making a capital "E." To this question the witness was explaining that the variance in forming letters may be due to the writer's haste in one instance and to his cautious or more deliberate acts at another time. The court interrupted his examination at this point by saying: "The Court: Well, do I understand you to say that the questioned documents in your opinion were written cautiously?"

The inference is that they were written fraudulently. The foregoing statements of the judge and his suggestions regarding the theory of the contestant's case and the effect of the evidence clearly infer that the judge believed the will and letter were forgeries.

We are unable to see how the jury could have avoided receiving that impression.

Under the circumstances of this case, it appears that the jury must have been prejudicially influenced by the inadvertent statements of the judge. We would not be disposed to place great stress on the rule of law which vests the jury with the exclusive province of determining the weight and effect of the evidence and which precludes the court from making prejudicial statements which are likely to influence their judgment, except for the fact that the great weight of the evidence appears to support the validity of the will and that the evidence is in conflict with the findings of the jury. Experience teaches that many jurors, doubtful of their own judgment respecting the issues of a case, with justifiable confidence in the training and ability of the trial judge, are keen to observe and follow any suggestion which he may express to aid them in reaching a solution of their problems. In reversing a judgment on account of prejudicial statements of the judge which were made in the presence of the jury, the Supreme Court said in that regard in the case of Berguin v. Pacific Elec. Ry. Co., 203 Cal. 116, 120, 263 P. 220, 222: "It needs no citation to convince any unbiased observer that a jury has both ears and eyes open for any little word or act of the trial judge, from which they may gather enough to read his mind and get his opinion of the merits of the issues under review."

[11] We are confident the trial judge did not intentionally express his opinion to the jury that the will was forged, but his language certainly conveys that impression, and it seems evident from the verdict that the jury must have been prejudiced thereby. The innocent purpose with which the language was uttered is wholly immaterial. We are to be guided by the result rather than the purpose. The primary object on appeal is to construe a record according to the established rules of law so as to assure litigants of a fair and impartial trial, if possible.

[12] The rule with respect to the effect of prejudicial utterances or conduct of a trial judge applies with peculiar force to the proceedings with relation to the contest of a will for the reason that it is a well-recognized fact that jurors are prone to upset wills which do not accord with their personal views of justice. Too great hostility is exhibited on the part of jurors against the efforts of testators to devise their property to individuals other than their blood relations. Too frequently jurors assume that such devises are unjust and inhuman, and that it is their duty to correct the assumed injustice. But from ancient time the law has recognized the absolute right of a testator, who is of sound mind and free from undue influence, to dispose of his property by will as he desires. Under such circumstances the expressed wish of the testator is paramount. In Re Estate of Morey, 147 Cal. 495, 505, 82 P. 57, 61, our Supreme Court has said in that regard: "The right to dispose of property in contemplation of death is as old as the right to acquire and possess property, and the laws of all civilized countries recognize and protect this right. It seems, however, to be the impression among many that if the property is not disposed of as the surviving relatives, near or remote, may think it should have been disposed of, the decedent must have been incompetent to transact business, or was acting at the time under undue influence of some kind."

To this assertion we may add that jurors who are not satisfied with the manner in which property is devised too frequently find some flimsy excuse for setting such wills aside. The case last cited quotes approvingly from In re Carriger, 104 Cal. 81, 84, 37 P. 785, 786, as follows: "To set aside a will * * * is a serious matter, and a verdict having that effect should be closely scrutinized by the trial judge. The upsetting of wills is a growing evil."

In Re McDevitt, 95 Cal. 17, 33, 30 P. 101, 106, the late Mr. Justice Temple said: "The right to dispose of one's property by will is most solemnly assured by law, and is a most valuable incident to ownership, and does not depend upon its judicious use. The beneficiaries of a will are as much entitled to protection as any other property owners, and courts abdicate their functions when they permit the prejudices of a jury to set aside a will merely upon suspicion, or because it does not conform to their ideas of what was just and proper."

Realizing that this tendency exists on the part of juries to set aside wills for inadequate causes, there is greater reason why a judge should be extremely cautious to avoid any suggestions which may prejudice the jurors.

Regarding the caution which should be exercised by a judge to avoid conveying an intimation to the jury of conviction or prejudice, regarding the weight or effect of evidence or the credibility of witnesses, it is said in 84 A. L. R. pages 1172, 1181, notes:

"The trial judge in a criminal case should not by the form, manner, or extent of his questioning indicate to the jury his opinion as to the defendant's guilt, or as to the weight or sufficiency of the evidence. * * *

"It is generally held that a trial court's interrogation of a witness is improper where it amounts to an indication to the jury of his opinion as to the merits of the defense, or as to the weight or sufficiency of the evidence."

The rule above announced applies with equal force to a civil action before a jury.

In 40 Cyc. 2439 it is said: "It is proper for a trial judge to ask a witness questions for the purpose of informing himself or the jury as to any matters material to the issues, whether the case be a civil or a criminal one, provided the questions are not such as to injure or prejudice the rights of either party. But the examination of witnesses is the more appropriate function of counsel, and the power of the court to interrogate witnesses should be exercised only in rare instances and under exceptional circumstances, most carefully, and in such a way as will not tend to prejudice the jury against either party."

In 64 C. J., p. 97, §§ 101–108, it is said in that regard: "It is improper for the judge presiding at the trial of an action to express or indicate, directly or indirectly, to the jury or in their presence or hearing, any opinion as to the credibility of evidence or a witness. * * * It is improper for the judge presiding at a trial to indicate, by any comment or remark made in the presence and hearing of the jury, his opinion as to the weight or sufficiency of any evidence in the case, or as to what has or has not been established. * * * The judge presiding at a trial should make no remark or comment in the presence and hearing of the jury which tends to emphasize or minimize the value, weight, or effect of evidence admitted. So comments tending to weaken or strengthen the effect of expert testimony are improper. * * * Improper remarks or conduct on the part of the judge presiding at the trial of an action may ordinarily be cured, or the impropriety obviated, by admonishing or instructing the jury to disregard them, * * * but where a remark or conduct is so prejudicial that the impression thereby produced in the minds of the jury cannot reasonably be expected to be removed by an admonition or corrective statement, the impropriety is not thereby cured."

Aside from some circumstances which the contestant claims infer that the will was forged, and the testimony of one handwriting expert who so declared, many circumstances support the will, and six expert witnesses testified to the validity of the instrument and the genuineness of the signature of the testator.

Under the circumstances of this case, it does not seem unreasonable that Mr. Golden should have devised one-half of his property to his friend Stoddard, since the testator had been separated from his relatives most of the years of his life. He left the East "under a cloud." His wife was dead. He had no children. He told his friend Olinsky of these facts and said he did not intend to give his property to his relatives, but that he was going to will it to his friends Miller and Stoddard. Evidently Golden must have been a man of considerable ability and standing in his community. He had acted as justice of the peace, city marshal, and deputy county assessor. There can be little doubt of his friendship for Mr. Stoddard. Seven witnesses testified to that fact. There are but two trivial circumstances which may be said to contradict that claim of friendship. It does appear that in 1920, ten years before the will was drawn, Stoddard, as a member of the Fort Bragg city council, voted against Mr. Golden for city marshal, and Mr. Miller, who testified that he had expected Golden to leave his property to his adopted son, of whom the testator was fond, said that a woman once informed Golden, while he was marshal of Fort Bragg, that Stoddard was "asleep in his car on the Plaza," and suggested that he be taken care of. Miller testified that the woman said that Golden merely cursed Stoddard as a drunken s—— of a b——ch, and paid no attention to him. These circumstances seem of small importance. There is no other evidence that Golden and Stoddard were not always the best of friends. They had been associated in business and political affairs of Mendocino county for nearly thirty-five years on apparently the friendliest of terms. Five witnesses testified that the reputation of Stoddard for truth, honesty, and integrity was good in that community. Evidently he did bear a good reputation. As a councilman, as a contractor, and as a business man of some prominence on the Mendocino coast, the integrity of Mr. Stoddard was not questioned. The evidence indicates that neither his business training nor his natural talents would fit him for the task of successfully forging a name, much less of simulating the handwriting of another person in two entire documents. The intimation of respondent was that Stoddard forged the documents; yet there was no attempt to prove that the penmanship of the challenged will resembles his handwriting. Apparently no comparison was made of the handwriting of the will with that of Mr. Stoddard's penmanship. Two professional experts on handwriting were called as witnesses from outside the county. One of them declared that it was his opinion the will was a forgery. The other, with equal confidence, declared that it was genuine. It may be said that character of evidence was evenly balanced. Five other prominent reputable expert witnesses, who live in and about Fort Bragg, testified positively of their acquaintance with George Golden, their familiarity with his handwriting, and their belief that the will contained his genuine signature. No other evidence on that subject was adduced. The evidence which was furnished by the resident experts of the genuineness of the testator's handwriting contained in the will is very persuasive. Mr. Bolden, the cashier of the Coast National Bank of Fort Bragg, testified that he had known Golden for years, that he had conducted business with him at the bank, that he knew his handwriting and that both the will and the letter were in George Golden's handwriting. He further said he would be willing to cash a check for $5,000 on that signature. Carl Sauer, the manager and cashier of the Fort Bragg branch of the Bank of America, testified that he had known George Golden for many years and that he was familiar with his handwriting. He declared that the signatures on the two challenged documents were the genuine signatures of George Golden, and that he would not hesitate to cash a check upon those signatures. Mr. Reynolds, the county assessor under whom George Golden acted as a deputy for several years, testified that he had received hundreds of documents signed by the deceased. He said he had often seen him write his name, that he was familiar with his signature, and that the will and letter contain the genuine signatures of George Golden. Leonard Stone, an attorney of Fort Bragg, said he had often seen the deceased write his name as a justice of the peace in that township, that he was familiar with his handwriting, and that the will and letter in question contain the genuine signatures of George Golden. Frank Caughey, the former clerk of the Supreme Court, testified that he had examined the city books of Fort Bragg as an expert while Golden was its city recorder. He asserted that he had often seen him write, that he was familiar with his handwriting, and that the signatures on both the will and the letter in dispute are the genuine signatures of the deceased.

[13] It is true that the rule with respect to assigning the conduct of a judge or of counsel as prejudicial ordinarily requires an objection to be made thereto in the course of the trial so as to afford the trial judge an opportunity to correct the prejudicial impression. But there is a clear exception to that rule when it appears that the challenged statements are of such a nature that their effect may not be cured by an explanation or by instructions to the jury. 64 C. J. 103, § 108; Hughes v. Hartman, 206 Cal. 199, 206, 273 P. 560, 563.

In holding that an assignment of prejudicial error on the part of the trial court was waived on appeal by failure to object to the challenged statements, the Supreme Court said in the case last cited: "This rule might not apply where the remark was of such a character that its prejudicial effect could not be cured by any subsequent action by the trial court. The remark of the court in the present action, of which complaint is made, is not of such character."

For an attorney to challenge the statements of a judge in the presence of the jury frequently serves to emphasize and aggravate the prejudicial effect thereof. That fact is well illustrated by the record in the case of People v. Mahoney, 201 Cal. 618, 258 P. 607, in which the judgment of conviction of manslaughter growing out of the collapsing of a grandstand at Pasadena was reversed.

In support of his contention that the appellant waived his right to assign the prejudicial character of the court's remarks as error on appeal, the respondent cites Price v. Northern Elec. Ry. Co., 168 Cal. 173, 142 P. 91; Hughes v. Hartman, 206 Cal. 199, 273 P. 560; Loeb v. Kimmerle, 215 Cal. 143, 9 P.(2d) 199; Bartolini v. Andrioli, 123 Cal. App. 350, 11 P.(2d) 66; Hughes v. Duncan, 114 Cal. App. 576, 300 P. 147; and Foley v. Hornung, 35 Cal. App. 304, 169 P. 705. Upon examination of these cases we find nothing in conflict with the foregoing statement of the exception to the general rule announced to the effect that an assignment of prejudicial error is not waived by failure to object to the conduct or utterances at the trial when it is apparent that the effect thereof will not be cured by subsequent explanation or instructions to the jury. In most of the cases relied upon by the respondent the language complained of does not appear to have been prejudicial. We are persuaded that the rule with respect to a waiver of an assignment of prejudicial comments of court or counsel by failure to object thereto, in the interest of justice, should not be extended beyond its present application by the courts, and that, when it appears that such conduct is prejudicial and cannot be remedied by subsequent action of the court in a case where the judgment is clearly contrary to the great weight of evidence, the assignment of error on appeal should not be deemed to have been lost by a failure to object thereto in the course of the trial.

For the reasons that we deem the remarks of the trial judge to have been prejudicial to the appellant, and that the weight of the evidence is contrary to the findings of the jury, the judgment is reversed.

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1 Cal.App.2d 481

METCALF v. METROPOLITAN LIFE INS. CO.*

Civ. 5137.

District Court of Appeal, Third District, California.

Oct. 19, 1934.

Rehearing Denied Nov. 17, 1934.

Hearing Denied by Supreme Court Dec. 18, 1934.

1. Insurance 🔑366

Insured's failure to exercise term insurance option under life policy after default in payment of premium does not prevent beneficiary's exercise thereof after insured's death; such election being property right, not mere personal privilege.

2. Insurance 🔑364

Beneficiary's tender to insurer of amount of insured's indebtedness against life policy, authorizing payment thereof at any time while policy was in force, after insured's death, *held* effective as against contention that policy was not in force because of insured's default in payment of premium (Civ. Code, § 450).

3. Insurance 🔑364

"Lapsed policy" is not policy entirely forfeited or canceled, but one on which there has been default in payment of premiums after payment thereof for three years; policy remaining in force according to statutory provisions after such default (Civ. Code, § 450).

[Ed. Note.—For other definitions of "Lapse," see Words & Phrases.]

4. Insurance 🔑365(1)

Beneficiary's tender to insurer of amount of insured's indebtedness against life policy, lapsed for nonpayment of premium, after insured's death, did not reinstate primary insurance, in view of policy provision for reinstatement by insured, who never applied therefor.

5. Insurance 🔑366

Insured's indebtedness against life policy, giving him certain options, predicated on absence of indebtedness, after default in payment of premiums, did not bar his exercise of statutory option (Civ. Code, § 450).

6. Insurance 🔑152(3)

Statutory provision for term insurance after default in payment of premium must be read into life policy giving no options because of insured's indebtedness to insurer (Civ. Code, § 450).

7. Insurance 🔑370

Court's findings in action on life insurance policy that net reserve or cash surrender value after grace period for payment of premium in default would purchase term insurance for period terminating after insured's death *held* sufficient to support judgment for extended insurance.

> Insured died 37 days after due date of unpaid premium, and court found that net reserve or cash surrender value of policy at expiration of 30-day grace period would purchase term insurance in amount of policy at insured's age for 1 year and 96 days under one mortality table and over 3 months under another.

8. Insurance 🔑365(1)

Primary insurance not being reinstated by beneficiary's offer to pay indebtedness against life policy at date of insured's death, there was no sum available for purchase of pure endowment under option in policy.

◆

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Nellie G. Metcalf against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant appeals.

Modified, and affirmed as modified.

Hearing denied by Supreme Court; PRESTON, J., dissenting.

Knight, Boland & Riordan and F. Eldred Boland, all of San Francisco, for appellant.

Clarence N. Riggins, of Napa, for respondent.

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*Hearing denied by Supreme Court 38 P.(2d) 401.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff in this action had judgment against the defendant for and on account of a certain life insurance policy issued by the defendant upon the life of her husband, Charles C. Metcalf. From this judgment the defendant appeals.

On March 14, 1921, the insurance company issued its policy to Charles C. Metcalf, whereby it promised to pay to respondent, as beneficiary, upon proof of death of Charles C. Metcalf, $1,000, less any indebtedness existing against said policy, in consideration of the application and the payment of a quarterly premium of $14.28, on the 14th day of every March, June, September, and December thereafter until twenty years' premiums should have been paid. All of the premiums were paid upon the policy up to and including June, 1932. The premium falling due on September 14, 1932, was not paid. Charles C. Metcalf, the insured, died on the 21st day of October, 1932. The policy provided for thirty days' grace in the payment of overdue premiums. No such payment, however, was ever made. During the life of the policy, the insured had borrowed thereon the sum of $402.69, giving a note therefor signed by himself, and also by the plaintiff in this action. At the expiration of the thirty days' grace which we have just mentioned, it is contended by the appellant that the net reserve or cash surrender value of the policy was the sum of $26.13. After the death of the insured, the plaintiff tendered to the appellant the amount of the indebtedness, but payment was refused; the contention of the appellant being that the policy was no longer in force.

The policy involved in this action contains the following provisions alleged to be applicable where the insured has defaulted in the payment of any premium, to wit: "Upon failure to pay any premium or any part thereof when due, this policy, except as otherwise provided herein, shall immediately lapse. If, however, the lapse occurs after three full years' premiums shall have been paid, the owner hereof, provided there be no indebtedness hereon, shall, upon written request filed with the Company at its home office together with the presentation of this policy for legal surrender or for endorsement within three months from the due date of premium in default, be entitled to one of the following options: First—a cash surrender value. The Company in its discretion may defer the payment of the cash value for a period not exceeding ninety days from the date of the application therefor. Second—To have the insurance continued for a reduced amount of non-participating paid-up endowment insurance (including any existing additions to the credit of the policy), payable at the same time and under the same conditions as this policy. Such paid-up insurance shall have an increasing cash surrender value equal to the full reserve at the date of surrender, or a loan value up to the limit of the cash surrender value. Interest on loan under such paid-up insurance shall be payable annually in advance to the end of the policy year at the rate of six per centum per annum. Third—To have the insurance continued for its original amount as term insurance in whole number of months from due date of premium in default, without participation, and without the right to loan, and if the sum applicable to the purchase of such term insurance shall be more than sufficient to continue the insurance to the end of the endowment period named in the policy, the excess shall be used to purchase in the same manner non-participating paid-up pure endowment (in even dollars for each one thousand dollars of insurance) payable at the end of the endowment period and on the same conditions as this policy. The extended contract under this option may be surrendered for its full reserve at the date of surrender. If the owner shall not, within three months from due date of premium in default, surrender this policy to the Company at its home office for cash surrender value or for endorsement for paid-up insurance or term insurance as provided in the above options, the policy shall be continued for a reduced amount of paid-up insurance as provided in the second option. * * * Any indebtedness of the Company under this policy will be deducted from the cash value; and such indebtedness will also reduce the amount of paid-up insurance or the amount continued as term insurance and any pure endowment payable at the end of the endowment term, in such proportion as the indebtedness bears to the cash value at the date of premium in default."

It will be observed that these options are conditioned upon the following words: "Provided there be no indebtedness hereon." The validity of the options so conditioned will be considered later, together with section 450 of the Civil Code.

The policy likewise provides in paragraph No. 6 that: "The whole, or any part of the indebtedness may be repaid at any time while the policy is in force."

[1] The plaintiff sought to avail herself of the privileges contained in the third option

set forth in the policy, corresponding very closely to the provisions of section 450 of the Civil Code. In this particular it is contended by the appellant that, the insured not having exercised any option, the right of the parties in relation thereto became fixed on the date of the death of the insured. Even if we were to conclude that the third option set forth in the policy is valid, the contention of the appellant in relation to the exercise of the option is untenable. It is true that in some states it is held that, if the insured does not exercise such option after default, no such option can be exercised after his death. That, however, is not the law in this state.

In Nielsen v. Provident Savings Life Assur. Soc. of New York, 139 Cal. 332, 73 P. 168, 171, 96 Am. St. Rep. 146, where a like question was presented for consideration, the court disposed of the contention in the following language: "It is not necessary that the demand and surrender of the policy referred to in the statute should be made before the death of the insured. The provision in the statute concerning a 'demand made' does not expressly require that this 'demand' shall come from the insured. And, inasmuch as any other construction of the statute might result in a forfeiture of her rights, we will give the statute a liberal, and at the same time a not unreasonable, construction, and hold that this demand may be made by the beneficiary, the only party really interested in the policy, after the death of the insured. The contract of insurance does not require any demand. The statute does not say that the demand shall be made in the lifetime of the insured, nor by the insured. It is but natural that the demand should come from the real party in interest, and the Legislature could not have intended that it should come from any other source after the death of the insured. In case a choice of a paid-up policy is made, it is to be considered as a policy issued at the date of the lapse, and the same is true where the choice is for an extension of the insurance. In that case the extension is manifestly to be deemed as having been made at the time of the default, although the option to take such extension was not exercised until after the death of the insured. The principle that, under such circumstances, a demand may be made after the death of the insured, was decided in Wheeler v. Connecticut Mutual Life Ins. Co., 82 N. Y. 554, 37 Am. Rep. 594."

In Knapp v. John Hancock Mut. Life Ins. Co., 214 Mo. App. 151, 259 S. W. 862, 865, the Court of Appeals of Missouri held that the beneficiary's right of election between options was not qualified by limitations placed upon the insured. The language used in the opinion in that case is applicable here, to wit: "It is very generally held, in cases where the options given in the policies were substantially the same as in the policy under review in the instant case, that the right of election under the options given is a property right, not a mere privilege purely personal to the insured, and that, in case the insured die after default and within the period allowed for making his election, the right of election survives to the beneficiary. We think the holding is founded upon the soundest sort of judicial reasoning. Veal v. Security Mutual Life Ins. Co., 6 Ga. App. 721, loc. cit. 726, 65 S. E. 714; McEachern v. New York Life Ins. Co., 15 Ga. App. 222, loc. cit. 231, 82 S. E. 820; State Mut. Life Ins. Co. v. Forrest, 19 Ga. App. 296, 91 S. E. 428; Nielsen v. Provident Savings Life Assurance Society, 139 Cal. 332, loc. cit. 338, 73 P. 168, 96 Am. St. Rep. 146; Wheeler v. Connecticut Mutual Life Ins. Co., 82 N. Y. 543, loc. cit. 554, 37 Am. Rep. 594; New York Life Ins. Co. v. Noble, 34 Okl. 103, 124 P. 612, 45 L. R. A. (N. S.) 391; Dorr v. Phœnix Mutual Life Ins. Co., 67 Me. 438; Lenon v. Mutual Life Ins., 80 Ark. 563, loc. cit. 567, 98 S. W. 117, 8 L. R. A. (N. S.) 193, 10 Ann. Cas. 467."

In New York Life Insurance Company v. Noble, 34 Okl. 103, 124 P. 612, 615, 45 L. R. A. (N. S.) 391, the Supreme Court of Oklahoma, considering the right of a beneficiary to make election, ruled as follows: "Therefore we think it follows that the rights of the beneficiary are the same as if the insured had defaulted then within the six months elected to take, in settlement of his rights, an extension of the policy for such time as the net reserve in the company's hands would pay for as a single premium, and that the sum recoverable is whatever the policy covenanted to pay except as to participation in the profits prohibited by the statute." See, also, 37 C. J. 510, 511, and cases there cited.

[2, 3] The second objection urged by the appellant is that the beneficiary had no right or authority to pay off the loan, and therefore that the tender made by her, and apparently shown to be good as a tender, was and is wholly inoperative. The argument in this particular is based upon the words found in the policy which we have heretofore set forth, to wit: "The whole, or any portion of the indebtedness may be repaid at any time while the policy is in force"; it being urged by the appellant that upon default in the pay-

ment of the premium due September, 1932, the policy was no longer "in force."

Again, the authorities show that this contention is untenable. What is called a "lapsed policy" is really a misnomer, if used to convey the idea that the policy is entirely forfeited or canceled as to all of its provisions. It is really a policy only upon which there has been a default in the payment of premiums, after premiums have been paid for three full years. The policy, by virtue of section 450 of the Civil Code, thereafter remains in force according to the provisions set forth in the section.

In Knapp v. John Hancock Mutual Life Assurance, supra, we find the following: "Under the provisions of the policy, the insured was entitled to three options upon default in payment of the premium, to wit: (1) To have the policy continued for a reduced amount as paid-up insurance, payable at the death of the insured; (2) to have the policy continued for its full amount as paid-up extended term insurance; or (3) to receive the surrender value of the policy in cash, with a deduction in each case of the insured's indebtedness to the defendant."

The distinction is then drawn between what is called the "primary" insurance and the "secondary" insurance under the option provisions, and it is held that for all of the secondary provisions or secondary insurance the policy is still in force. Likewise, in the case of North Carolina Mutual Life Insurance Co. v. Terrell, 227 Ala. 410, 150 So. 318, 89 A. L. R. 1459, it is held that the policy remains in force until the expiration of the period for the exercise of the options contained therein, and then as to the election that may be made. In that case, however, the court expressly withheld its ruling upon the right of the beneficiary to make an election of options.

Again, in McEachern v. New York Life Insurance Co., 15 Ga. App. 222, 82 S. E. 820, 825, the same principle is upheld. It is there said: "There were two forms of insurance provided for, primary and secondary. So long as the premiums were duly paid, the insured was entitled to the primary insurance, which, if carried to maturity, would have entitled the insured to certain accumulation benefit therein provided for, in addition to the face value of the policy. When the policy lapsed, as above stated, his right to primary insurance was forfeited, and the company's liability was remitted to the secondary insurance provided for in the nonforfeiture provisions above quoted, to wit, paid-up insurance or extended insurance. During the 13 years preceding the lapse, the premium paid each year by the insured was not only paying for current insurance, but was building up a reserve to the policy, which paid for, and legally entitled him to, the secondary insurance guaranteed by the policy in case the lapse should occur by failure to pay premiums. He was as much entitled to the secondary insurance after the lapse as he was to the primary insurance prior to the lapse. He had paid for both."

It is further held that this property right, if the election was not exercised by the insured prior to his death, might be exercised by his legal representative, citing the authorities which have heretofore been cited.

[4] While we have held that, under the particular terms of the policy involved in this action, payment of the indebtedness might be made after default, as the terms of the policy read that such indebtedness may be paid at any time while the policy is in force, instead of reading, at any time before default in the payment of any premium, it does not follow that what has been termed "primary insurance" in the cases which we have cited became thereby reinstated. Such holding would be contrary to the express terms of the policy. Paragraph 7 of the instrument under consideration precludes any such conclusion. Upon the failure to make payment of any premium as specified in the policy, and the expiration of thirty days' grace thereafter, primary insurance could only be reinstated as provided for in paragraph 7 of the policy. That paragraph reads: "If this policy shall lapse in consequence of nonpayment of any premium when due, it may be reinstated at any time upon the production of evidence of insurability satisfactory to the Company, and the payment of all overdue premiums, with interest at six per centum per annum"; any loan which existed at date of default, together with interest at the same rate to the date of reinstatement, to be, at the option of the owner on application for such reinstatement, either repaid in cash or continued as an indebtedness against the policy. No reinstatement was ever had or applied for by the insured. Thus, the rights of all of the parties became fixed at the date of the death of the insured as to both primary and secondary insurance, as those terms have been defined herein.

[5, 6] This brings us to a consideration of section 450 of the Civil Code and the applicability of the three option clauses set forth in the policy.

As heretofore stated, the options set forth in paragraph 5 of the policy are predicated upon there being no indebtedness. The premise upon which the options are based reads: "If, however, the lapse occurs after three full years' premiums shall have been paid, the owner hereof, provided there be no indebtedness hereon, shall, upon written request filed with the company, at its office * * * be entitled to one of the following options."

There having been an indebtedness against the policy involved in the instant case, no options are allowed by the policy. The basis laid down for the exercise of any of the options set forth in the policy being illegal, recourse must necessarily be had to the provisions of the Civil Code. The fact of indebtedness does not legally obviate the necessity of extending to the insured the exercise of one of the options specified in section 450, supra. The indebtedness goes only to a limitation of the amount of money available in the exercise of one of the options. Not having, as we have said, provided for an option in accordance with the laws of this state in its nonforfeiture provisions, there must be read into the policy the first provision of the section granting nonparticipating term insurance. That provision reads as follows: "First—Paid-up non-participating term insurance in the amount of the face of the policy, plus dividend additions, if any, for such a period as the net value outlined above will purchase at the net single premium, at the attained age of the insured at the time of the lapse, based upon the reserve basis described in the policy; provided, however, that under endowment contracts the term shall not extend beyond the endowment period named in the original contract, and the excess value, if any, shall be applied as a net single premium to purchase in the same manner paid-up pure endowment insurance, payable at the end of the endowment period named in the contract if the insured be then living."

[7, 8] Findings Nos. VII and VIII of the court are as follows:

"That $26.13 applied as a net single premium to purchase term insurance for $1,000.00 at the age of 57 years, calculated on the American Experience Table of Mortality and 3½% interest would purchase said insurance for a term of 1 year, 96 days."

"That $26.13 applied as a net single premium to purchase term insurance for $1,000.00 at the age of 57 years, calculated on the Metropolitan Intermediate Table of Mortality and 3½% interest would purchase said insurance for a period in excess of 3 months."

Either one of these findings is sufficient to support the judgment upholding the right of secondary extended insurance on the life of the insured for the sum of $1,000, to a date subsequent to his death. There is no finding by the court, however, showing any sum available for the purchase of pure endowment in the sum of $382, or any other sum, unless we were to hold, directly contrary to the terms of the policy, that primary insurance had been reinstated by the offer of plaintiff to pay the indebtedness existing against the policy at the date of the death of the insured subsequent to the fixing of the rights of the parties under the terms of the policy as they existed at that date. Nor is there anything in the record showing the existence of any dividend additions, or the amount thereof, if any such had accrued.

The statutes of the various states are so different in their terms that each case must in large measure be governed solely by local provisions. As we have said, also, there is a conflict of authority on the right of election by the legal representative of the insured, yet that question we think is settled in this state.

In view of what we have said, it is not necessary to review all of the authorities cited by the appellant. We will, however, point out some of the distinctions.

In Rustin v. Ætna Life Insurance Co. of Hartford, Conn., 98 Neb. 426, 153 N. W. 548, cited by the appellant, we find that, where there was an indebtedness against the policy at the time of the death of the insured, the holding of the court was that the excess of the reserve over the indebtedness could properly be used in the purchase of extended temporary insurance. The only question there involved really was the amount of the reserve applicable for the purchase of extended insurance.

In Dwyer v. Metropolitan Life Insurance Co., 132 S. C. 10, 129 S. E. 84, there had been no attempt to exercise the right of election or to secure temporary extended insurance.

In Massachusetts Mutual Life Insurance Co. v. Jones (C. C. A.) 44 F.(2d) 540, it appears that the insured himself selected extended term insurance, and, in ascertaining the amount available for the purchase of extended term insurance, it was held that the indebtedness against the policy should be properly charged against the cash surrender value in ascertaining the term of the extended insurance.

In the case of McDonald v. Columbian National Life Insurance Co., 253 Pa. 239, 97 A. 1086, L. R. A. 1916F, 1244, the court, as we have stated, held that the right of election was personal only to the insured, and not a property right descending to the beneficiary or representative of the insured. This holding, however, is contrary to the decision of the Supreme Court in the case of Nielsen v. Provident Savings Life Assurance Society of New York, supra, and the cases heretofore cited.

With the appellant entitled to receive the amount of money tendered in payment of the indebtedness on the insurance policy, it follows from what we have said that the sum of $382 should be stricken from the judgment. And it is so ordered. As so modified, the judgment will stand affirmed. Both parties will pay their own costs on appeal.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

1 Cal.App.2d 577

PEOPLE v. HANCOCK et al.

Cr. 173.

District Court of Appeal, Fourth District, California.

Oct. 23, 1934.

Criminal law 🔑1186(4)

That juror, during trial, had read newspaper article merely stating state's allegations that defendants stole property in question, and that, if convicted of current charge of petty theft, they would be liable to sentence under Habitual Criminal Act did not constitute prejudicial error where no evidence of prior convictions was offered, judge instructed jury to consider only evidence introduced and not to consider degree of punishment and where juror made affidavit that she did not consider article and that it did not affect her verdict and case was not close on evidence (Pen. Code, §§ 593, 644; Const. art. 6, § 4½).

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

R. M. Hancock and Clarence Hancock were convicted of petty theft with prior convictions, and they appeal.

Affirmed.

Frederick E. Hoar, of Bakersfield, for appellants.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendants, brothers, were jointly charged with the crime of misdemeanor, to wit, petty theft, with two prior convictions of felony. It was charged in the information that on March 19, 1934, they unlawfully took certain designated property of a named person of the value of $25. It was further alleged that one of the defendants had suffered a prior conviction for forgery, the other one for grand theft, and that both had theretofore been convicted of a violation of section 593 of the Penal Code. The defendants admitted the prior convictions and pleaded not guilty to the charge of petty theft. They were convicted by a jury and have appealed from the judgment and from an order denying their motion for a new trial.

The only point raised is that the court erred in denying the motion for a new trial, which was based upon the contention that the jury had received evidence out of court other than that resulting from a view of the premises. In support of the motion for a new trial there was introduced the affidavit of one of the jurors to the effect that during the progress of the trial she had read an article which appeared in a local newspaper reading as follows:

"Petty Theft Counts May Lead to Prison. R. M. Hancock and Clarence Hancock went on trial today before Superior Judge Allan B. Campbell charged with petty theft. The state alleges they stole a rifle and clothing belonging to Martin Bengocheas. In the state's information it is also alleged the defendants have been convicted of other felonies. Should a conviction result from the petty theft charge the defendants will be liable to sentence under the habitual criminal act, according to the district attorney's office. Attorney Fred Hoar is representing the defendants and Norman Main, deputy district attorney, is prosecuting for the state."

In opposition thereto, the district attorney filed an affidavit by this same juror to the effect that, while she had read this item in the newspaper, the reading of the same did not affect her decision as a juror in this case; that she did not take the same into consideration; and that to the best of her knowledge and belief said news item did not in any way influence any of the other jurors in arriving at their verdict. It is argued that while this matter could not have been considered as first presented to the trial court under the rule that jurors will not be heard to impeach their own verdict, that rule has no application here since the matter now appears from an affidavit of the juror filed by the district attorney in support of the verdict.

The contention is that prejudicial error appears because the jury were informed by this newspaper item that both appellants had suffered prior convictions, which fact could not legally have been brought to the attention of the jury since neither of them took the witness stand. It is further argued that the statement in the newspaper item to the effect that the appellants, if convicted, would be subject to sentence under the Habitual Criminal Act (Pen. Code, § 644) is not true since one prior conviction of each appellant was for a violation of section 593 of the Penal Code and the crime therein denounced is not one of those mentioned in section 644 of that Code.

It may first be observed that the newspaper item in question does not state, as a fact, that the appellants had been convicted of other felonies. It is merely stated that the state had alleged that this was true and the statement as to the possible punishment was attributed to the district attorney's office. If they considered the matter at all, it may well be that the jurors thought the charge of prior convictions had been abandoned as no proof was offered concerning the same and nothing was said with regard thereto during the trial, and the court instructed them that they were to consider only the evidence which had been introduced, and that they were not to take into consideration the degree of punishment that might be imposed. Again, these matters, if considered at all by the jury, may well have been beneficial to the appellants since a jury might naturally be reluctant to brand them as habitual criminals when such a small amount was here involved. There is no showing that the reading of this newspaper item was prejudicial to the appellants and the only direct showing in the record is to the contrary, as the juror referred to alleged that she had not considered the same and that the same had not affected her verdict.

Assuming that this incident might be held prejudicial in a close case, no such situation is here presented. The appellants concede that under section 4½ of article 6 of the Constitution the question here presented "depends largely on the court's opinion as to whether as 'respondent claims the evidence introduced was as clear and convincing of (defendants') guilt as could be possible' and that irrespective of the error the jury must necessarily have found the defendants guilty." It is then argued that there was nothing improbable in the defense of innocent possession of the stolen property and that the jury might have accepted as true the testimony offered by the appellants in support thereof, had it not been for this prejudicial matter. Several witnesses for the appellants testified to the effect that they had heard a third party tell one of the appellants a few days before the appellants were arrested that he wanted "to store some stuff over to your house" and that shortly after the appellants were arrested this third party told them that he wanted to get some "stuff" he had at the appellants' house as this stuff might get the appellants in trouble. This third party denied making any such statements but, if the jury believed every word of the testimony thus given by the appellants' witnesses, it could hardly have affected the verdict as none of the witnesses even intimated that the property which the third party was supposed to have left at the appellants' house was the property here in question. The only testimony was that this other party said he had left some property at the appellants' home. It appears from the record that considerable other stolen property was found at the appellants' house and there is nothing in the evidence, relied on by the appellants, which connects the property referred to by their witnesses with the property here involved. On the other hand, the property here in question was found in the appellants' home, one of the appellants freely admitted to the officers that he and his brother had taken the same and the other appellant, when confronted with his brother and with his statement of the facts, had nothing to say. Not a single fact was established which tends to show innocent possession of the property and the entire evidence is such that it would be an insult to the intelligence of the jury to say that they could have found to the contrary.

Under these circumstances, we are not able to say that the trial court abused its discretion in denying the motion for a new trial, that the matter in question must have affected the verdict, or that it was of such a nature that it must be held to have been prejudicial as a matter of law.

The judgment and order appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.

1 Cal.App.2d 598

SAN BERNARDINO COUNTY v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 1525.

District Court of Appeal, Fourth District, California.

Oct. 24, 1934.

1. Evidence 🔑245

Recital in work order given by city engineer in charge of relief work project that relief worker was employed by county *held* not binding on county where engineer was not employee or agent of the county and no responsible representative of county knew of contents of order.

2. Master and servant 🔑364

That work being done by relief worker at time of injury was on project planned for benefit of county was not determinative of whether worker was engaged in doing "made work" so as not to be employee of county.

> "Made work" is "made job" given to indigent as matter of relief rather than that the enterprise on which the work was performed was made or planned solely for relief and without benefit to locality; word "work" referring to labor performed and not project on which it was performed.
>
> [Ed. Note.—For other definitions of "Work," see Words & Phrases.]

3. Evidence 🔑23(1)

That much of relief work is done on well-established public projects is common knowledge.

4. Master and servant 🔑364

Person who, though not formally placed on county indigent rolls, was without means of support and was given relief work in lieu of other aid was "relief worker" and not "employee" of county, and hence he could not recover compensation for injury received while at work (St. 1901, p. 636, as amended).

> [Ed. Note.—For other definitions of "Employee," see Words & Phrases.]

5. Master and servant 🔑364

Person employed on relief work project who was not hired, selected, or paid by county, and who could not be discharged by alleged county employee in charge of work except for physical disability or refusal to do reasonable day's work, and whose demand for wages though approved by county board of supervisors could not be paid until approved by person not county employee, was not "employee" of county so as to entitle him to compensation for injuries sustained while at work.

Proceeding under the Workmen's Compensation Act by George W. Barnes opposed by San Bernardino County, a body corporate and politic of the state of California, employer. To review a decision of the Industrial Accident Commission awarding compensation to the claimant, the employer prosecutes a writ of review.

Award annulled.

Stanley Mussell, Dist. Atty., and James L. King, Chief Deputy Dist. Atty., both of San Bernardino, for petitioner.

Everett A. Corten, of San Francisco, and James G. Whyte, of Pomona, for respondents.

MARKS, Justice.

The Industrial Accident Commission gave George W. Barnes an award against the county of San Bernardino for injuries received by him on June 7 and 8, 1933, while working in Cucamonga Canyon in San Bernardino county.

The petitioner has sought to have this award annulled upon the grounds that Barnes was not an employee of the county within the meaning of that term as it is used in the Workmen's Compensation Act and as construed in the cases of McBurney v. Industrial Accident Commission, 220 Cal. 124, 30 P.(2d) 414, Rico v. Industrial Accident Commission, 137 Cal. App. 772, 30 P.(2d) 584, Martin v. Industrial Accident Commission, 137 Cal. App. 771, 30 P.(2d) 527, and County of Los Angeles v. Industrial Accident Commission (Cal. App.) 35 P.(2d) 1035. The parties are not only in sharp disagreement as to the law applicable to this case, but also as to the facts proved. Therefore it will be necessary to detail the evidence before the commission in more than ordinary detail.

In 1931, the Legislature passed a bill appropriating the sum of $400,000 to be used in controlling and conserving the flood waters of the Santa Ana river system by constructing upon the river and its tributaries in San Bernardino county "dams, protection barriers and such incidental works as shall be necessary for such purpose." St. 1931, p. 1367, § 1. The state engineer was given general powers of recommendation and approval of the works to be constructed. Under the provisions of the act, the comptroller was authorized, on July 1, 1931, to draw a state warrant in favor of the county treasurer of San Bernardino county in the sum of $200,000, and a like warrant for a like sum on July 1, 1932. Both sums were deposited in the county treasury.

The act provided "that no part or portion of said sum shall be expended unless and until provisions shall have been made by the interested county or counties or by the interested district or districts, or by any city or any other interested agency affected or benefited by such work or having charge of the construction thereof, affected or benefited by such work, for the payment annually, of one-half of the cost of such part of the work as shall be programmed for construction during the then current fiscal year. * * * The money hereby appropriated and made available and the money to be provided by the interested county or counties, or interested district or districts, shall be paid to and deposited with the county treasurer of San Bernardino county in a special fund to be known as 'Santa Ana river flood control fund,' and paid out only upon warrants duly authorized, drawn and signed by the agency having charge of the construction of such dams, protection barriers and incidental works" (sections 3, 4).

Ten water companies (presumably private corporations or associations) had organized the Cucamonga Protective Association to undertake some work connected with flood waters from the Cucamonga Canyon. They subscribed a fund to be used with an equal amount of state funds for paying the cost of the preliminary surveys, plans, and specifications, expenses of superintendence, tools, materials, and supplies to be used in the protection work in this canyon. Several of their engineers, including R. V. Ward, formerly engineer of the Cucamonga Water Company, did the preliminary work. As the act appropriating the money provided that the work should be in charge of a governmental agency, Ward was appointed superintendent of construction by the board of supervisors of San Bernardino county, at the request of the Cucamonga Protective Association. Except for a few days during the early part of his employment, his salary was paid out of the state funds and the money subscribed by the members of the association, and not out of the public funds of San Bernardino county.

There were three separate divisions of the Santa Ana river flood control fund on the books of the auditor of San Bernardino county. Each consisted of state money and equal amounts of money furnished by other agencies; one, the Cucamonga Protective Association; another, federal relief funds allotted to San Bernardino county by Mr. Branion, state administrator of relief, and administered by E. H. Grier, local administrator; and the third, other agencies not disclosed in the record, though San Bernardino county probably contributed some public money to this fund. The fund composed of equal amounts of state money and federal relief funds was used to pay the wages of those citizens of San Bernardino county on emergency unemployment relief, among whom was Barnes. Before any money was paid out of this fund, the pay rolls of the laborers had to be approved by Grier. It further appears in the record, without contradiction, that "all this emergency relief fund money had to be expended under the direction of Mr. Grier, the local director." The actual demands for all wages were approved by the board of supervisors of San Bernardino county and warrants issued by the county auditor on the fund in favor of the workmen. It affirmatively appears that these warrants were paid exclusively out of money furnished by the state and federal governments. No moneys of the county of San Bernardino derived from local sources were expended for this purpose.

During the earlier period of the depression, there were a number of agencies in the city of Ontario, in San Bernardino county, devoting their separate energies to relief work. Later these were consolidated under one relief committee composed of volunteer members and headed by C. T. Holmer, city engineer of Ontario.

[1] George W. Barnes was a needy resident of the city of Ontario and applied to this committee for aid. For about three months prior to his injury, he was sent by the committee to work on the Cucamonga Canyon project for two days each week. He was given weekly work orders signed by Holmer, all on identical forms. The pertinent portion of these work orders was as follows:

"Ontario Unemployment Relief
"No Smoking
"No. 631

"Instructions:

"By special arrangement this work will be handled entirely by the County of San Bernardino, and you will be employed by the county. You will receive your pay check at the Ontario Chamber of Commerce one week after completion of work.

"Rate of pay, $3.25 per day."

Holmer was not an employee of the county of San Bernardino, nor was is shown that he was its agent or acting for it in giving work orders. Neither was it shown that any responsible officer or representative of the county of San Bernardino had any knowledge of the contents of the order. It is evident, therefore, that the statement in the order that Barnes was to be employed by the county of San Bernardino was nothing more than the opinion or conclusion of Holmer and could not be binding on the county.

The evidence shows that the wages to be paid Barnes were not fixed by the county of San Bernardino; that the men paid by the state and relief funds were selected from the welfare list by Holmer; that Ward had nothing to do with the selection of the individuals reporting for work; that he could refuse to give work to a man sent by Holmer only if it was apparent that the man was physically unfit and unable to perform a day's work; that he could not discharge these men unless they proved physically unfit or were deliberately not doing a reasonable day's work.

Respondents seek to distinguish the instant case from McBurney v. Industrial Accident Commission, supra, upon two grounds. They maintain that here the work being performed by Barnes was not "made work" as in the McBurney Case, but a project for the benefit of a large number of the citizens of the county and planned long before the "relief" work was undertaken. They also urge that it is not shown that Barnes had ever been placed on the relief rolls of the county, as was true in the McBurney Case, and therefore he was not a ward of the county and that the county owed him no duty of support.

[2, 3] It is true that the work being done by Barnes was on a project which had been planned for the benefit of the county and its citizens long before his injury. It also appears that "this entire project was a relief work, and entirely relief work, and it was relief work and a relief project for the purpose of employing persons who were unemployed." We do not believe that the time when a project was planned, or the benefits to the citizens of a county that may follow from its completion, can be determinative of the question of whether or not those employed upon it are engaged in doing "made work." This sort of employment is so common now that it is a matter of common knowledge that much of this work is done on well-established public projects. We often see large gangs of these men doing repair and maintenance work upon long established main highways. These highways have to be kept in repair and the work done on them is for the benefit of the public. McBurney was working at cleaning out a drainage ditch, not constructing a new one. A drainage ditch must be cleaned at intervals in order that it may properly function. The term "made work" should be construed as a "made job," given to indigents as a matter of relief rather than that the enterprise upon which the work was performed was made or planned solely for relief and without benefit to the locality. The word "work" refers to the labor performed and not the project upon which it was performed. Under this definition the work assigned to Barnes was "made work" as it was given to him solely as a matter of relief.

[4] It is true that Barnes had not been placed on the indigent rolls of San Bernardino county. Barnes testified that he was without means of support; that in sixty days he had received $120 from the welfare league in Ontario. The following appears in his testimony: "Q. And you were given County Relief of some kind? Wasn't that true? A. You mean work of some kind? Q. You were given work in lieu of other financial or material aid? A. Well, yes. The idea was to get work; bread. That was the reason." It therefore appears that he was an indigent person entitled to relief from San Bernardino county. St. 1901, p. 636, as amended. The mere fact that he had not been formally placed on the county indigent rolls should not change his status from a relief worker to that of an employee under the rule announced in the McBurney Case. We have reached this conclusion after giving due consideration to the cases of McLaughlin v. Antrim County Road Commission, 266 Mich. 73, 253 N. W. 221, and City of Waycross v. Hayes, 48 Ga. App. 317, 172 S. E. 756, upon which respondents rely.

[5] We have also reached the conclusion that Barnes was not in the employ of the county of San Bernardino at the time of his injury for the following reasons: There was no contract of hire between Barnes and the county. The county did not select him for the work. Ward (assuming but not holding that he was an employee of the county) was required to let Barnes work if he were physically competent. Ward could not discharge Barnes except for physical disability or refusal to do a reasonable day's work. Barnes was paid out of a trust fund furnished by the state and federal governments which could only be disbursed by the county for specific purposes. The federal funds could be used on approved relief projects only. No county funds were used to pay him. His wages were not fixed by the county. He could receive nothing for his work until the pay roll upon which his name appeared was approved by Grier who was not a county employee. That his demand for wages was approved by

the board of supervisors of San Bernardino county and the warrant issued by the county auditor seems to have been a matter of convenient routine adopted in disbursing the trust funds.

The award of the Industrial Accident Commission is annulled.

We concur: BARNARD, P. J.; JENNINGS, J.

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1 Cal.App.2d 570

PEOPLE v. ALEXANDER.

Cr. 2605.

District Court of Appeal, Second District, Division 2, California.
Oct. 23, 1934.

1. Assault and battery 🔑92

In prosecution for assault with deadly weapon, evidence that complaining witness slapped defendant in belief defendant was about to attack with gun or knife, and that defendant thereupon inflicted several wounds on complaining witness, supported conviction.

2. Assault and battery 🔑67

In prosecution for assault with deadly weapon, that complaining witness slapped defendant in belief defendant was about to attack with gun or knife did not justify defendant in attacking with knife.

3. Criminal law 🔑1159(2)

Where evidence is ample to support verdict, verdict will not be disturbed on appeal.

4. Criminal law 🔑1186(4)

In prosecution for assault with deadly weapon, that complaining witness was not allowed to testify on cross-examination to questions which might have shown his scars were received in previous affray *held* not prejudicial error (Const. art. 6, § 4½).

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Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Van Alexander was convicted of assault with a deadly weapon, and he appeals.

Affirmed.

Leo Gallagher, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Defendant was convicted of assault with a deadly weapon. No motion for new trial was made. From the judgment he appeals on the ground that the evidence is insufficient to support the verdict and that the trial court erred in excluding certain testimony.

[1-3] The complaining witness, one Val, operated a restaurant and beer garden. Defendant came in with a companion, and they were served with beer. Shortly after midnight Val was about to close the place and requested defendant to get out. Upon the latter's refusal to leave, Val took him by the arm and defendant left. Later, as Val and his wife proceeded down the street, defendant pursued and overtook them, put up one hand, and said, "Stop," and drew the other back, whereupon, the witness testified, "when he put his hand like that I didn't know whether he had a knife or gun or what he had, and I thought it was best for me to protect myself first and I hit him on the face." Defendant got right up and inflicted several wounds on the witness with a knife. There was evidence that defendant had been drinking and was somewhat intoxicated.

It cannot be said that the evidence for the prosecution is so improbable or false as to be incredible, or that it so clearly preponderates against the verdict as to convince this court that it was the result of passion or prejudice. The resistance offered by Val to appellant's apparent intent to commit an assault did not justify the latter in attacking him with a knife. People v. Albori, 97 Cal. App. 537, 275 P. 1017. Since there was evidence ample to support the verdict, it cannot be disturbed on appeal. People v. Stine, 110 Cal. App. 156, 293 P. 907.

[4] On cross-examination of the complaining witness, counsel for defendant asked two questions: "(1) Have you ever been in a fight with anybody else in your life? (2) Is it not true that about three weeks before this occurrence there was a fight in your place?" Objection to these questions on the ground that they were not proper cross-examination was sustained. They were asked in an effort to show that the witness "might have received the scars in some other affray." The same witness was also asked, for the same purpose, "Your wound was white at the last trial?" to which objection was sustained on the ground that it called for a conclusion of the witness.

Defendant was asked, "What day were you arrested?" to which objection was sustained on the ground that it was immaterial. Appellant complains of these rulings as prejudicial error. It does not appear to us, after an examination of the entire cause, that a miscarriage of justice has resulted. The defendant took the stand and testified in his own behalf, giving a detailed story of the case as he wished to have the jury believe it, but which they apparently concluded was untrue. Any error which the trial court may have inadvertently made in any of the matters complained of could not have prejudicially affected the defendant's case. For these reasons the judgment should stand. Article 6, § 4½, Const. California; People v. Judson, 128 Cal. App. 768, 18 P.(2d) 379.

Judgment affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

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1 Cal.App.2d 629

KAMISCHER v. JOHN HANCOCK MUT. LIFE INS. CO.

Civ. 8798.

District Court of Appeal, Second District, Division 2, California.

Oct. 29, 1934.

Hearing Denied by Supreme Court Dec. 27, 1934.

1. Insurance ⇨141(3)

Insurer *held* precluded from defense that premium on life policy was unpaid, where policy provided that insurance granted was in consideration of application therefor, copy of which was attached, and of payment of annual premium, and of payment of like premium on certain day in each succeeding year, which provision was conclusive evidence of payment of premium (Civ. Code, § 2598).

2. Insurance ⇨152(3)

That application for insurance was by its terms part of life policy and purported to provide that policy should not be effective unless first premium installment had been paid before death, *held* not to change effectiveness of acknowledgment in policy that receipt of premium was conclusive evidence of its payment even though policy stipulated that acknowledgment should not be binding until premium was actually paid (Civ. Code, § 2598).

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Anna Kamischer against the John Hancock Mutual Life Insurance Company. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Pelton & Warne and Clore Warne, all of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (E. Avery Crary, of Los Angeles, of counsel), for respondent.

SCOTT, Justice pro tem.

Defendant issued a policy dated April 8, 1931, insuring the life of Meer Kamischer, husband of plaintiff. The insured was drowned May 31, 1931. The first premium on the policy was paid June 1, 1931, repayment thereof tendered by defendant upon fact of death becoming known and such tender refused. Upon refusal of defendant to pay plaintiff as beneficiary the amount of the death benefit under the policy, this action was instituted. At the close of plaintiff's case, motion for nonsuit was granted, and from judgment thereon, plaintiff appeals.

Although grounds for the motion for nonsuit were not stated with definiteness, it is apparent from the record that the ground relied upon was that plaintiff by her case affirmatively showed that the premium had not been paid within the lifetime of the insured, and that therefore the policy was not in effect.

[1, 2] At the time the policy was applied for, one Levy, sales agent, told the insured his credit was good; that no note for the premium was required; and that he could pay it within sixty days from the date of the policy. The policy contained the following: "This insurance is granted in consideration of the application herefor, a copy of which is attached hereto and made a part of this contract, and of the payment of the annual premium of One Hundred Seventy-One and 65/100 Dollars and of the payment of a like premium on or before the Eighth day of April in each succeeding year. * * *" Appellant refers to Civil Code, § 2598, which reads: "An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid." The language of the policy above quoted is in effect an acknowledgment

of the receipt of the premium, and by reason of the Code provisions respondent is precluded from the defense that the premium was not paid. Masson v. New England Mutual Life Insurance Co., 85 Cal. App. 633, 260 P. 367, and cases therein cited. The fact that the application for the insurance was, by its terms, a part of the policy does not change the effectiveness of the Code section cited, notwithstanding it purported to provide that the policy should not be effective unless the first premium installment had been paid before death.

Judgment reversed.

We concur: STEPHENS, P. J.; DESMOND, J.

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1 Cal.App.2d 618

LANSDOWN v. SMITH & SONS RESERVE CORPORATION, Limited, et al.

Civ. 648.

District Court of Appeal, Fourth District, California.

Oct. 25, 1934.

1. Mortgages 🔑333

Complaint, in action by beneficiary under trust deed for injunction to restrain allegedly unauthorized sale of security by beneficiary under another trust deed, *held* insufficient for failure to allege that lien of plaintiff's trust deed was junior to that of deed, the enforcement of which was sought to be enjoined.

2. Appeal and error 🔑1138

That sale which was sought to be enjoined had taken place prior to hearing on appeal would authorize denial of reversal of judgment refusing injunction, since reversal could not benefit appellant.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by Clarrie M. Lansdown against the Smith & Sons Reserve Corporation, Limited, and others. From a judgment sustaining a general and special demurrer to the complaint without leave to amend, plaintiff appeals.

Affirmed.

Forgy, Reinhaus & Forgy, of Santa Ana (A. M. Bradley, of Santa Ana, of counsel), for appellant.

Drumm, Tucker, Martell & Drumm, of Santa Ana, for respondents.

BARNARD, Presiding Justice.

In this action the plaintiff sought to permanently enjoin the defendants from selling certain real property, proceedings for the sale of which had been begun under a trust deed given to the defendant title company to secure a note given by the individual defendants to the first-named corporation defendant.

The amended complaint alleged that the plaintiff was the beneficiary under another trust deed covering the same property, and that both trust deeds were recorded on the same day. In a first cause of action it was alleged that no default existed in connection with the first-named trust deed, as all payments due had been fully paid, while a second cause of action charged the first-named corporation defendant with fraud, in that it procured its trust deed knowing that the individual defendants were at all times unable to pay the debt represented thereby, and knowing that the individual defendants never intended to make any payment on account of that debt. A general and special demurrer was sustained without leave to amend, and, from the judgment which followed, the plaintiff has appealed.

[1] The only argument presented is upon the question as stated by the appellant, "whether a junior beneficiary under a trust deed may be granted an injunction to prevent an unauthorized sale of the security by a prior encumbrancer." In making this argument, it is assumed that the lien of the trust deed owned by the appellant is, in fact, junior to the lien of the trust deed held by the first-named respondent. This argument discloses the same weakness which appears in the complaint where certain essential facts are apparently assumed without being alleged. In neither of the causes of action attempted to be set up in the complaint is it alleged, either directly or indirectly, that the lien of appellant's trust deed is inferior or junior to that of the trust deed the enforcement of which is sought to be enjoined. For all that appears in the complaint, the appellant's lien is superior to the other, and the sale of the individual respondents' interest in the property, which is alleged to be threatened, would not affect the appellant's title or interest in

the least. If we also indulge in the assumption that the appellant is correct in her position on the only question presented, that one holding a junior incumbrance may bring an action to restrain an unauthorized sale under a senior or superior lien, the fact remains that the amended complaint was deficient and the court was correct in its ruling on the demurrer.

[2] **A** further consideration is that it is pointed out by the respondents, and not denied by the appellant, that the sale which is here sought to be enjoined has long since taken place. If this is true, a reversal could be of no benefit to the appellant, and the matter has become moot. Faria v. Brandon, 206 Cal. 730, 276 P. 106.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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1 Cal.App.2d 563

BENEDICT v. LILLY.

Civ. 8022.

District Court of Appeal, Second District, Division 1, California.

Oct. 23, 1934.

Rehearing Denied Nov. 14, 1934.

Hearing Denied by Supreme Court Dec. 20, 1934.

Appeal and error 🔑1011(1)

Reviewing court cannot weigh conflicting evidence.

Appeal from Superior Court, Los Angeles County; R. M. Rankin, Judge.

Action by Eva Benedict against Lilly Lilly. From an adverse judgment, plaintiff appeals. Affirmed.

Sparling & Teel, of Los Angeles, for appellant.

Lyndol L. Young, M. K. Young, and John C. Gillham, all of Los Angeles, for respondent.

YORK, Justice.

Appellant's first point upon this appeal is that the evidence is insufficient to support the findings. The argument advanced in support of this is one that would call for the weighing of conflicting evidence by this court. Of course, it is impossible for the court to do this. An examination of the transcript discloses sufficient evidence to support the material findings.

The second point is that the defendant's pleadings are insufficient and that findings are not made of material facts. We find nothing in the argument of appellant that would justify a reversal of the judgment on this ground.

Appellant's third point is that the court's findings are inconsistent, but we are unable to find such an inconsistency as would justify a reversal.

As her fourth point, appellant states that the court erred to the prejudice of plaintiff in the admission of evidence. We find nothing in the specifications advanced to support this point that would justify a reversal of the judgment rendered.

The judgment is therefore affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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1 Cal.App.2d 593

STETSON v. BLUM.

Civ. 5138.

District Court of Appeal, Third District, California.

Oct. 24, 1934.

1. Automobiles 🔑244(36)

Evidence that defendant, though warned of approach of another automobile, was driving on wrong side of 16-foot mountain highway as he approached blind curve, and that he was watching outer edge of highway and did not see approaching automobile until it was but 15 feet away, though he could see 50 feet ahead, supported finding that collision was proximately caused by defendant's negligence (St. 1931, pp. 2124, 2126, §§ 122, 126).

2. Damages 🔑132(8)

$1,200 for lacerations of forearm and fingers nearly severing tendons of hand, painful bruise on forehead and nose, and abrasion of knee *held* not excessive.

3. Appeal and error 🔑1004(1)
Damages 🔑96

Determination of amount of damages for personal injuries and pain and suffering incident thereto sustained as result of negligence rests largely in sound discretion of trial judge or jury, and will not be interfered with, unless it clearly appears that amount awarded is grossly excessive or result of abuse of discretion or passion and prejudice.

4. Appeal and error ⚷1071(1)

Where damages awarded for personal injuries were not excessive as compensation for actual injuries received, judgment would not be reversed for alleged error in finding that injuries were permanent and impossibility of determining what proportion of judgment was founded on alleged erroneous finding.

5. Damages ⚷185(2)

Evidence that numbness of skin below laceration on arm would remain, and that severed nerves might not grow into lacerated area, and that scars would be permanent, sustained finding that injuries were permanent.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Earl Stetson, a minor, by Tom Stetson, his guardian ad litem, against Henry Blum. Judgment for plaintiff, and defendant appeals.

Affirmed.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellant.

Clarence N. Riggins, of Napa, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the Court.

The defendant has appealed from a judgment of $1,200 which was rendered against him for damages for personal injuries received by the ward of plaintiff in an automobile collision which occurred on a mountain grade.

The appellant contends the evidence fails to show that the defendant was guilty of negligence which proximately caused the accident, that the amount of the judgment is excessive, and that it is based partly on the theory that the minor received permanent injuries, which permanency is in conflict with the evidence.

There is a conflict of evidence on many essential features of the accident which are involved in this case, but the following statement of facts is supported by substantial evidence which renders them controlling on appeal. At 9 o'clock on the morning of June 30, 1933, Earl Stetson, a minor, was riding in a Ford automobile as a passenger, with his companion, Melvin Marshall. The boys were about fourteen years of age. The machine belonged to Melvin's father. Melvin was driving without a license. They were taking four cans of cream from Marshall's home to market. Both boys lived with their parents in Sage Canyon adjacent to the Napa Valley. They were traveling down grade along a crooked mountain highway which varied from 16 to 20 feet in width. They were traveling at the rate of from 12 to 15 miles an hour. When they reached a sharp turn in the road called Horseshoe Bend, where the highway was bordered on their right-hand side by a steep bank and on their left side by a precipitous gulch, the speed of the Ford car was retarded, and they made the turn in the road close to the inside bank on the proper side of the highway. Just beyond this turn they suddenly, without previous warning, observed the defendant's Essex sedan about 30 to 40 feet away, coming up the grade. Although the highway was at least 16 feet in width at that point, the Essex car, according to the statement of both boys, occupied a position on the wrong side of the roadway within 2 feet of the inside bank. The defendant had given no warning of his presence. He started to pull his machine toward the outside of the grade, but proceeded only about the distance of one car length, when he stopped his car. The defendant's machine was then too close to the inside bank to enable the Ford car to pass. Marshall immediately applied his brakes, which were in good mechanical condition, but was unable to avoid a collision, in spite of the fact that the right mudguard was actually scraping the bank.

Both machines were seriously damaged. The windshield of the Ford car was shattered. The left fender was crumpled. Both headlights were broken, and the car was otherwise damaged. Stetson was thrown forward upon the windshield. He received a laceration of the left forearm 3 inches in length, and lacerations of the fingers of the left hand which nearly severed the tendons thereof. There was a painful bruise on his forehead and on the bridge of his nose and an abrasion of the left knee. The injury to his arm consisted of a deep incision which severed the blood vessels and a tendon. This wound bled profusely. The boy was confined in the St. Helena Sanitarium for some time for surgical and medical treatment.

The cause was tried by the court without a jury. Findings were adopted favorable to the

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

plaintiff, and judgment for damages in the sum of $1,200 was accordingly rendered.

[1] The record contains sufficient evidence to support the findings of the court to the effect that the accident was proximately caused by the negligence of the defendant. There is evidence to support the conclusion that the defendant was driving his machine on the wrong side of a 16-foot highway as he approached a blind curve where his view was obstructed beyond a distance of 40 feet ahead of his machine. This conduct was in violation of sections 122 and 126 of the California Vehicle Act (St. 1923, pp. 557, 558, as amended by St. 1931, p. 2124 and p. 2126). The defendant admitted that he had seen a "cloud of dust" on the winding highway about 200 feet ahead of him, which should have warned him of the approach of the Ford machine. He said that he did not see the approaching car until it arrived within 15 feet of his machine, although he testified that, "if you watched the road, I presume you can see fifty or sixty feet" ahead at that point. He claimed to have been watching the outer edge of the highway. Assuming that the foregoing version of the evidence is true, it amply supports the court's conclusion that the defendant was guilty of negligence in the operation of his automobile which proximately caused the accident.

[2-5] The damages which were awarded to the plaintiff in this case do not appear to be excessive, in view of the nature of the injuries which were received by Earl Stetson as hereinbefore related. The serious laceration of his arm and the injury to his nose must have been accompanied by severe pain. The determination of a sum of money which will be deemed to adequately compensate one for damages suffered on account of personal injuries sustained as the result of negligence, together with the pain and suffering incident thereto, necessarily rests largely in the sound discretion of the trial judge or jury. This discretion may not be interfered with on appeal, unless it clearly appears that the amount which is awarded is so grossly excessive as to shock the conscience or enforce the inference that it is the result of an abuse of discretion or that it is the result of passion and prejudice on the part of a jury. Rannard v. Harris, 121 Cal. App. 281, 8 P.(2d) 864; Even v. Pickwick Stages System, 109 Cal. App. 636, 293 P. 700; 20 Cal. Jur. 101, § 65. No such inference may be drawn from the record in the present case.

Nor may we hold that the judgment is excessive, for the reason that the court found that the injuries were permanent in their nature, and that it is impossible to determine what proportion of the judgment is founded on the asserted erroneous assumption that the injuries are permanent.

It is true that the court specifically found that Earl Stetson sustained "a deep cut extending across the three fingers of plaintiff's left hand, partially severing the tendons and cords; a deep cut in the lower forearm * * * partially severing the tendons of said arm; a severe blow on plaintiff's nose, and a contusion of plaintiff's right knee; and as a result thereof plaintiff suffered great loss of blood and suffered great pain, and as a result thereof it was necessary for plaintiff to procure hospital service and services of physicians." The court also found that paragraph IV of the complaint is true, which paragraph did allege on information and belief that the injuries were permanent.

The damages which were awarded in this case do not appear to be excessive as compensation for the actual injuries received, together with the pain and suffering incident thereto, independently of any damages which may have been included on the theory that some of the injuries may be permanent in their nature. For that reason, the judgment would not be reversed on the ground of excessive damages. Respecting the question of permanency of the injuries, Dr. Talmage testified that there is an ugly scar on the arm where it was cut, that the fingers and hand which were injured lacked strength, and that there was a numbness of the flesh in the vicinity of the wound on the arm. The doctor testified in that regard:

> "His left hand is not as strong as normal. * * * I believe that it will become approximately normal in time. * * * There is a numbness of the skin just below the laceration of the arm. * * * After a year or so it may partially disappear, but it will probably remain to some extent. * * * The nerves were severed at the time the tissues were cut and the question is whether the nerves will again grow into that area so that he will be able to fill his ordinary duties. * * *
>
> "Q. Now, will the scars that appear upon his arm and fingers be permanent? A. Yes."

This evidence is adequate under the circumstances of this case to support the finding respecting the permanency of the injuries.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

1 Cal.App.2d 625

TEEL v. CAMDEN FIRE INS. ASS'N et al.

Civ. 9146.

District Court of Appeal, Second District, Division 1, California.

Oct. 29, 1934.

Appeal and error ⚿979(2)

Grant of new trial on ground of insufficiency of evidence to sustain verdict for defendants would not be disturbed where record disclosed no abuse of discretion on part of trial court; grant or refusal of motion for new trial being particularly within discretion of trial court.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by James A. Teel against the Camden Fire Insurance Association and another. From an order granting a new trial after judgment and verdict in favor of defendants, defendants appeal.

Affirmed.

Knight & Reynolds, of Los Angeles, for appellants.

Sparling & Teel, of Los Angeles, for respondent.

YORK, Justice.

This is an appeal from an order granting a new trial after judgment on verdict in favor of appellants. On May 18, 1931, the plaintiff suffered injuries as the result of a collision with a motortruck owned by Signal Trucking Company. He thereafter brought an action against the trucking company and recovered judgment in the sum of $17,170.60 and costs of suit. At the time of the accident, the trucking company carried with the defendant insurance companies a contract of insurance indemnifying it against liability for injuries to persons and damage to property arising out of or occasioned by the use, operation, and maintenance of the trucks of said assured. The present action was brought against the insurance companies to recover the amount of the judgment rendered against the assured, except for the sum of $1,570, which has been paid on the judgment by the assured.

Defendants interposed the defense that the contract of insurance had lapsed prior to the accident by reason of the fact that the monthly premium for the policy had not been paid. Affixed to the policy of insurance was the following indorsement:

"It is hereby understood and agreed that the annual premium under this policy, amounting to $2,320.57, shall be due and payable as follows:

"$386.77—upon delivery of the policy.

"$175.80—on the eighth day of each succeeding month thereafter during the currency of this policy.

"It is further understood and agreed that the failure of the assured to pay to the company or its duly authorized representative the sum of $175.80 as above set forth shall terminate the company's liability under this policy as of said due date."

It is conceded that the policy of insurance was dated April 8, 1931, and it is shown by the evidence that the initial payment of $386.77 was made on the date the policy was delivered, and that the check for $175.80 which was given by the trucking company in payment of the premium due on May 8, 1931, was not paid.

Upon trial of the action, the jury brought in its verdict in favor of the defendant insurance companies, whereupon plaintiff made his motion for a new trial upon all of the statutory grounds. The order granting said motion specified: "One of the grounds for this ruling is the insufficiency of the evidence."

Appellant now contends that the evidence was amply sufficient to justify the verdict and that the other grounds of the motion for new trial were untenable in fact and in law. A careful examination of the record before us convinces us that there was no abuse of discretion on the part of the trial court in granting the motion for a new trial. "Insufficiency of the evidence to justify the verdict or decision is a ground for new trial appealing particularly to the discretion of the trial court, and its order either granting or refusing a new trial has not been disturbed on appeal in the absence of a showing of abuse of discretion. The rule adopted in the appellate court, that the verdict of a jury will not be disturbed on the ground of insufficiency of the evidence, unless it appears, without substantial conflict, that there is no evidence to sustain the verdict, has no application to the trial court. The judge of that court has the same opportunity to see the witnesses, to judge of their credibility, and of the degree of weight which ought to be given to their evidence, as the jury has, and is often better qualified to determine these questions than the jury itself. If there is any appreciable conflict in the evidence, action of the court in granting a new trial is conclusive on the appellate court; and even where there does not appear to be a conflict in the evidence, the action of the trial court will not be disturbed where there appears to flow from the general surrounding circumstances of the case, probable justification for discrediting or giving no weight to testimony which, on its face, may bear all the earmarks of probability. The appellate court does not interfere with the action of the trial court in granting a new trial, even when the evidence on which it has acted may consist of depositions and documentary and oral evidence." 2 Cal. Jur. p. 908.

"It has been held in many cases in this state that the granting or refusing of a new trial is a matter largely in the discretion of the trial court, and it is only when this discretion has been abused that the appellate court will reverse the order. Merralls v. Southern Pac. Co., 182 Cal. 19, 186 P. 778.

"In the case of Smart v. Spangler, 89 Cal. App. 351, at page 354, 264 P. 806, 807, the court said: 'The well-settled and familiar rules governing courts of appeal are that insufficiency of the evidence to justify the verdict is a ground for new trial peculiarly within the province of the trial court, and its order granting a new trial will not be disturbed on appeal unless it clearly appears that there was an abuse of discretion. These rules have been so often announced that citation of authorities is unnecessary.'" Ford v. Wilson, 107 Cal. App. 131, at page 135, 290 P. 120, 121.

It therefore becomes unnecessary for us to rule on the other grounds of the motion.

The order granting the motion for new trial is affirmed.

We concur: CONREY, P. J.; HAHN, Justice pro tem.

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1 Cal.App.2d 631

In re ROZEN-GOLDENBERG'S ESTATE.

Civ. 9965.

District Court of Appeal, Second District,
Division 2, California.
Oct. 29, 1934.

Wills 🔑191

Where widow, after making will bequeathing property to daughter, met and subsequently married spouse who eventually survived her, will *held* revoked as to such spouse, though will stated that testatrix, except as therein provided, with full knowledge omitted to provide for her heirs living at time of her demise, since husband, unknown to testatrix when she made will, could not have been referred to by such language (Probate Code, § 70).

◆

Appeal from Superior Court, Los Angeles County; J. W. Mullin, Jr., Judge pro tem.

In the matter of the estate of Beckie Rozen-Goldenberg, also known as Beckie Rozen, also known as Beckie Collins, also known as Beckie Levy, deceased. Proceeding by the California Trust Company, as executor of the will of said decedent, and Ray Goldsmith, beneficiary, for the probate of the will. From a judgment declaring the will revoked as to the right and claim of Harry Goldenberg, to succession as surviving spouse, the executor and beneficiary appeal.

Affirmed.

Paul C. Hill, of Los Angeles, for appellant California Trust Co.

John Henderson Pelletier, of Los Angeles, for appellant Ray Goldsmith.

Desser & Bokofsky (by Arthur A. Desser) and P. M. Bokofsky, all of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Deceased made a will August 12, 1930, declaring that on that date she was a widow, that she had one daughter, appellant here, and three grandchildren, bequeathing her property to the daughter or to the grandchildren in case of the daughter's predecease. The will stated that the maker, except as in the will provided, with full knowledge omitted to provide for her heirs living at the time of her demise, and that any one contesting the will should receive but $1.

In November, 1932, deceased for the first time met respondent herein, and they were married on April 25, 1933. She died on December 29, 1933, leaving an estate consisting of her separate property.

When the will above described was offered for probate, respondent as surviving husband filed objections based on Probate Code section 70: "If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received."

The trial court gave judgment revoking the will as to the husband's right and claim to succession as surviving spouse of decedent. The judgment is obviously correct. Construing the Civil Code, § 1299, the substance of which was re-enacted as section 70 of the Probate Code, the court said in Sanders v. Simcich, 65 Cal. 50, at page 52, 2 P. 741, 742: "The law presumes that the subsequent marriage of a testator has wrought such a change in his condition in life as to cause him to destroy or cancel a previous will." "It is beyond dispute that both at common law, and under statutory enactments adopting the common-law rule that a will made by a woman shall be revoked by her marriage, the marriage of the woman produces absolute and complete revocation." Estate of Berger, 198 Cal. 103, 243 P. 862, 864. In Estate of Ryan, 191 Cal. 307, 216 P. 366, the court held that it was improper to go outside the language of the will itself to ascertain whether or not it was executed by the testator with his approaching marriage in mind and with reference to it, having quoted from Sanders v. Simcich, supra, parenthetically suggests, "See, also, Wood v. Corbin, 296 Ill. 129, 129 N. E. 553." The case referred to was one in which the Supreme Court of Illinois reversed the judgment of the trial court admitting to probate a will executed prior to the marriage of testator to the contestant, and remanded the case with directions to enter an order denying probate of the will, saying: "The statute has declared that a marriage shall be deemed a revocation of a will, and it must have that effect except in the case of a will which provides on its face for a future marriage and makes provision for the wife, conditioned upon such marriage taking place."

It would appear that the intention to make no provision for the future surviving spouse would have to be set out with greater certainty and explicitness than in the instant case if the revocation provided by section 70 of the Probate Code is to be averted, where, as here, there is no marriage contract and no provision for such survivor in the will.

This case is to be distinguished from Estate of Kurtz, 190 Cal. 146, 210 P. 959, 960. In that case deceased married the day after he made his will. The court sustained the will, but held that the ruling of the trial court excluding evidence to the effect that testator was engaged to marry contestant at the time he executed the will was error, and that it should have been admitted "for the purpose of showing *who the maker of the will intended to include* by the phrase 'any person whomsoever who, if I died intestate, would be entitled to any part of my estate,' a phrase which, if he had not been then engaged to marry the contestant, would be somewhat ambiguous, but which would be made certain by showing the fact of such engagement." (Italics ours.)

The cited case is not authority in the instant case, for the reason that a person, unknown to testatrix at the time of the execution of the will and subsequently married to her, could not have been included among those whom testatrix intended to refer to in her will.

Judgment affirmed.

We concur: **STEPHENS, P. J.; DESMOND, J.**

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1 Cal.App.2d 572

HAYES et al. v. KHINOO et al.

Civ. 5158.

District Court of Appeal, Third District, California.

Oct. 23, 1934.

1. Appeal and error 🔑1071(6)

In contractors' action for reasonable value of labor performed, where, under cross-complaint and answer thereto, issue was tendered as to whether work was done in good and workmanlike manner and according to usage and custom of best farmers in vicinity in accordance with contract, failure of trial court to find upon such issue required reversal of judgment for contractors and grant of new trial.

2. Appeal and error 🔑544(3)

Where cause was before reviewing court upon judgment roll alone, reviewing court's investigation was limited to contents of judgment roll.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by G. W. Hayes and another against Y. Khinoo and others, wherein defendants filed a demurrer and a cross-complaint. Judgment for plaintiffs, and defendants appeal.

Reversed, and new trial awarded.

Samuel V. Cornell, of Turlock, for appellants.

J. Lee Robertson, of Modesto, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiffs began this action to obtain payment of the alleged reasonable value of certain work and labor performed under the terms of a written contract. Judgment was entered in favor of the plaintiffs for the sum found to be due as the reasonable value of the work and labor performed, and also adjudging that the plaintiffs were entitled to a lien upon the real property mentioned in the complaint. The material portion of the complaint which contains a copy of the contract which is necessary to be considered herein is as follows:

"This agreement made this 5th day of December, 1931, by and between Y. Khinoo, party of the first part and hereinafter called the Owner, and G. W. Hayes and T. J. Hayes, parties of the second part, and hereinafter called the contractors,

"Witnesseth: That the said Owner hereby employs and engages the said Contractors to grade, check, level, ditch and prepare for cultivation and irrigation all of the land on his ranch not occupied by buildings and improvements lying 3½ miles west and ¾ mile south of Turlock, California, and consisting of approximately 40 acres.

"Said Contractors agree to do all work in conformity to a survey and profile which has been furnished them by the Owner and made by Elmer Wicklund, a surveyor, and it is agreed that all of said work shall be done under the supervision and direction of said surveyor. Said Contractors agree to begin said work on or before December 10, 1931, and to prosecute the work diligently until completed; and agree to complete the same on or before February 1, 1932. They agree also to do all of said work in good and workmanlike manner and to prepare the land according to the usage and custom of the best farmers in the vicinity of the land.

"Said Owner agrees to pay a total consideration of $797.50 for the completed job and to pay the same in installments as follows: When the engineer certified that ⅓ of the work has been completed according to the contract to pay 65% of ⅓ of the price, and it is agreed that the note of G. W. Hayes to the first party shall be accepted as part payment on this first installment; and that when ⅔ has been completed and certified by the engineer, to pay an additional sum up to 65% of ⅔ of the consideration; and when the whole job is completed, to pay the balance of said contract.

"Executed in duplicate the day and year first above written.

"Y. Khinoo
"G. W. Hayes
"T. J. Hayes."

The defendants demurred to said complaint on the ground that it failed to state a cause of action. The demurrer being overruled, the defendants filed a cross-complaint which, after referring to the contract, the work to be performed, and as to how it was to be performed under the terms of the contract, as payment, contained the following: "That thereafter the cross-defendant entered upon the performance of said contract and did undertake to do and perform a portion of the work contemplated by said agreement; that cross-defendants did not fully or at all do or perform any of the things to be done or performed by them under the terms of said contract, and that the work done by cross-defendants was not in accordance with the terms and provisions of said contract and was done in an unskillful and incorrect manner, with the result that the lands of this cross-complainant were thereby greatly injured, all to her damage in the sum of $400.00; that this said sum has not been paid nor has any part thereof."

The findings of the court material to be considered herein, after setting forth the copy of the contract, are as follows, to wit: "That on or about the 10th day of December, 1931, the plaintiffs entered upon the performance of said contract and continued to do and perform certain labor thereunder until on or about the 14th day of January, 1932; that Elmer Wicklund, the surveyor named in said contract, did thereafter on or about the 19th day of January, 1932, certify that less than one-third of the work agreed upon in said contract had been done, and that no work under said contract was ever done by the plaintiff thereafter; that thereafter and on or about the 21st day of January, 1932, the surveyor, Elmer Wicklund, did issue a second certificate wherein he did certify that more than one-third of said work had been done; that on the 14th day of January, 1932, plaintiffs had completed approximately one-half of the said work that was to have been performed under said contract; that plaintiffs gave notice to the defendants that unless said contract payments were made, plaintiffs would stop grading, leveling and checking on the said property as provided in said contract; that said defendants failed and refused to pay plaintiffs the amounts and sum of money as stipulated and agreed to be paid in said contract; that the defendants, by their refusal to so pay plaintiffs according to the terms of said contract, thereby broke their said contract with the plaintiffs; that plaintiffs did stop said work and rescinded and refused to continue with the work of grading, checking, and leveling of said land and made demand upon defendants payment of the reasonable value of the work and labor performed; that plaintiffs worked at grading, leveling and checking the said land with teams and equipment for a total period of sixty-seven and one-half days; that on quantum meruit the reasonable value per day for said work and labor is $7. per day per man, team and equipment, or a total sum of $472.50; that defendants advanced to plaintiffs and are entitled to a credit of the sum of $80.80; that the balance due plaintiffs from defendants on quantum meruit amounts to the sum of $391.70."

Appellants contend, first, that the complaint fails to state a cause of action; second, that the findings fail to support the judgment; and also make the point that the court failed to find upon all the material issues tendered by the pleadings.

In addition to the issuance of the surveyor's certificate relative to the amount of work that should be done before any installment of payment should become due, a condition of the contract must be considered, to wit: "They" (referring to the contractors) "agree also to do all of said work in good and workmanlike manner, and to prepare the land according to the usage and custom of the best farmers in the vicinity of the land." The complaint is absolutely silent as to the manner in which the work was done, whether it had been done in a good or workmanlike manner or according to profile or plans for the work. The only allegation in the complaint in this particular is that plaintiffs diligently pursued said work according to said contract.

[1] The findings of the court show that the surveyor issued two certificates, one, that a certain percentage of the work had not been done to entitle plaintiffs to an installment payment, and that no work was thereafter done, but subsequently the surveyor issued a second certificate to the effect that more than one-third of the work had been done. There is no finding by the court as to the character of the certificate, and no finding by the court that the work was done in a good and workmanlike manner. We call attention to these defects for the simple reason that the cause must be sent back for retrial on account of the failure of the court to find upon all the material issues tendered by the pleadings. The cross-complaint and the answer thereto interposed by the plaintiffs tendered the issue as to whether the work was done in a good and workmanlike manner and according to the usage and custom of the best farmers in the vicinity of the land; the defendants alleging in the cross-complaint that the work was not so done, and that their property had been damaged in the sum of $400 by the failure of the plaintiffs in performance of the work. Upon the issue so presented, the court failed to make any finding. Where a material issue is tendered by a cross-complaint, and the answer thereto, and the court fails to find thereon, the error is such that a retrial must be ordered. 24 Cal. Jur. 938. Christy v. Water-Works, 84 Cal. 541, 24 P. 307, considering the question of the failure of the trial court to find upon issues tendered by the cross-complaint, the Supreme Court used the following language: "The court below failed to find on either of these issues, and for this reason we have to reverse the judgment." The same question was before this court in the case of Cargnani v. Cargnani, 16 Cal. App. 96, 116 P. 306, and it is there held that a failure to find upon the issues tendered in the cross-complaint, and the answer thereto, necessitated a reversal of the judgment. Murphy v. Murphy, 141 Cal. 471, 75 P. 60.

[2] The cause being before us upon the judgment roll alone, our investigation is therefore limited to its contents.

The judgment is reversed, and a new trial awarded.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

1 Cal.App.2d 566

BOTELER v. KOULOURIS et al.

Civ. 9795.

District Court of Appeal, Second District, Division 2, California.

Oct. 23, 1934.

1. Landlord and tenant 🔑184(2)

Sum deposited with lessors by lessee "to insure its good faith in the performance of all the terms * * * of said lease" was "pledge" (Civ. Code, §§ 2986, 2987).

[Ed. Note.—For other definitions of "Pledge," see Words & Phrases.]

2. Appeal and error 🔑909(5)

Appellate court must assume that contract altering terms of written lease was in writing, as required by statute, in absence of any record negativing such fact, though not found by trial court (Civ. Code, § 1698).

3. Bankruptcy 🔑188(8)

Validity of lessee's pledge of sum, deposited with lessors to insure lessee's good faith in performance of terms of lease, was not affected by lessee's voluntary bankruptcy proceeding.

4. Bankruptcy 🔑164

Trusts 🔑35(1)

Lessors' contract to hold sum pledged by lessee for latter's benefit and apply it to payment of rentals destroyed pledge and created trust, so as to render payments therefrom to lessors within four months before filing of lessee's voluntary bankruptcy petition unlawful and recoverable by bankruptcy trustee.

◆

Appeal from Superior Court, City and County of Los Angeles; Wilbur F. Downs, Judge.

Action by L. Boteler, trustee in bankruptcy for the Great Western Sea Food Company, Incorporated, against Antone K. Koulouris and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

E. J. Fostinis, of Los Angeles, for appellants.

Derthick, Cusack & Ganahl, of Los Angeles, for respondent.

WILLIS, Justice pro tem.

On February 20, 1926, appellants leased certain real property to Great Western Sea Food Company, Inc. (hereinafter called "company" for brevity), for the term of ten years, by an instrument in writing which, among other provisions, recited that the sum of $5,000 had been deposited by the company with appellant lessors "to insure its good faith in the performance of all the terms, conditions and covenants of the within lease, it being understood between the parties hereto that in the event of all the terms, conditions and covenants of said lease are fully performed, said sum of Five Thousand Dollars ($5000.00) will apply on the rental for the months commencing May 1st, 1935, and ending on February 28th, 1936, and for no other months; it being understood that in the event of the party of the second part failing to comply with any of the terms, conditions or covenants herein specified and expressed, then in that event the said Five Thousand Dollars ($5000.00) shall remain the property of the parties of the first part as liquidated damages, and not as a penalty for any breach of said terms, conditions and covenants herein specified and expressed." The court found that such sum had been so deposited, and that in September, 1931, the company failed to pay its rent in full, but was permitted by appellants to continue in possession of the leased premises; that about June 1, 1932, appellants and the company "entered into an agreement whereby defendants agreed to hold said sum of Five Thousand Dollars ($5,000.00) for the benefit of Great Western Sea Food Co., Inc., and to apply the same to payment of rental for the use of the said premises by Great Western Sea Food Co., Inc., at such times and in such amounts as might be agreed upon by the said parties"; that on June 15, 1932, the sum of $3,000 was applied to cover balance of rent due in September, 1931, and for each successive month to and including June, 1932, with $100 on the rent for July, 1932; that thereafter on each succeeding month to and including November, 1932, there was applied the sum of $200 for balance of July rent, and the sum of $300 each for the succeeding months to and including November, 1932; that a balance of $600 of said original fund remained in the hands of appellants and was not applied until January 31, 1933, when a mutual release was executed by the parties; that during the four months next preceding March 15, 1933, the date of filing of its voluntary petition in bankruptcy, such company was insolvent, and that appellants knew or had reasonable ground to believe that said company was insolvent and that a release to appellants of said sum of $600 which they still held for the company's benefit and which they had not applied as rent would result in a preference in their favor; that provable claims of creditors aggregating an amount in excess of $22,000 have been filed in such bankruptcy proceeding; and that the reasonable value of the assets of said bankrupt does not exceed the sum of $8,000. On these findings the court based its conclusion that the payment of said sum of $600 constituted a voidable preference and that the trustee in bankruptcy was entitled to recover that amount. Judgment was accordingly entered from which this appeal is taken, based on the judgment roll alone.

[1] The sole question raised and to be determined herein is whether the payment to appellants by themselves out of the fund in question constituted a "preference" as defined in the bankruptcy law. Clearly the whole fund of $5,000 was, when first deposited, a pledge, which is defined as a deposit of personal property by way of security for the performance of another act. Section 2986, Civ. Code. "Every contract by which the possession of personal property is transferred, as security only, is to be deemed a pledge." Section 2987, Civ. Code. And it is equally clear that, assuming the validity of the contract found by the court to have been entered into about June 1, 1932, the character of the deposit as a pledge was destroyed, and the money constituting such deposit became money in the possession of appellants and held by them for the benefit of the company to be applied on rent as agreed upon in the future. Prior to the four months' deadline fixed by the bankruptcy law against payments in preference of creditors, all but $600 of the deposit had been thus disposed of, and obviously the portion thus previously paid out cannot be recovered by the trustee in bankruptcy.

[2] The court below did not find that the contract of June 1, 1932, altering the terms of the written lease relating to the deposit, was in writing as required by the provisions of section 1698 of the Civil Code. This, however, was not necessary, and in the absence of any record negativing it we must assume that such contract was in writing. McDonald v. M. V. Homestead Ass'n, 51 Cal. 210; Nunez v. Morgan, 77 Cal. 427, 19 P. 753.

[3, 4] Under the facts found, the validity of the pledge of the $5,000 could in no way be affected by the bankruptcy proceedings (Griffin v. Smith, 177 Cal. 481, 171 P. 92); but by the contract of June 1, 1932, the pledge status was destroyed—the money was thereafter held by appellants for the benefit of the company, to apply on rents to accrue and as from time to time agreed upon. This in effect constituted a trust under an agreement whereby the money was transferred by the company to appellants upon their promise to hold the same for the benefit of the company. Hearst v. Pujol, 44 Cal. 230; Hellman v. McWilliams, 70 Cal. 449, 11 P. 659. Under such circumstances any payments from such deposit to a creditor of the company subsequent to the four months' deadline fixed by the bankruptcy law would be in contravention of the terms of that law, and subject to recovery by the trustee in bankruptcy.

The judgment is affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

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1 Cal.App.2d 660

BONELLI et al. v. CONRAD.

Civ. 8767.

District Court of Appeal, Second District, Division 2, California.
Oct. 30, 1934.

1. Attorney and client 🔑166(1)

In action to recover for attorneys' services in obtaining special permit allowing business development of client's property, evidence *held* to sustain finding that contract required merely obtaining of such special permit and not rezoning of client's property from apartment house zone to commercial zone.

> "Spot zones," "special permits," and "conditional variances" are synonymous and refer to parcel in established zone excepted from its restrictions and released to other uses, permitted under another zone, as distinguished from rezoning of entire zone area, or from conversion of one zone into another by designation of descriptive letter.

2. Attorney and client 🔑166(2)

In action to recover for attorneys' services performed under contract which had been entered into two months after expiration and discontinuance of work under prior contract, evidence sustained finding that relationship of attorney and client had not existed at time contract sued upon had been entered into, and hence burden was on attorneys to prove fairness of transaction and that client was fully advised.

3. Attorney and client ⚷143

Presumption against validity of contract entered into by parties under relationship of attorney and client does not attach to contract by which relation is originally created and compensation fixed, but parties in agreeing upon terms of such contract deal at arm's length.

4. Trial ⚷252(23)

In action to recover for attorneys' services, where validity of written contract of employment had been attacked, submission, also, of cause of action on account stated based on letters between attorney and client *held* proper.

5. Appeal and error ⚷1068(2)

In action to recover for attorney's services, jury finding that written contract for compensation was valid and amount of compensation rendered harmless submission of cause of action on account stated for services.

6. Attorney and client ⚷167(2)

In action to recover for attorneys' services, whether relationship of attorney and client existed at time contract of employment was entered into, so as to impose upon attorneys burden of showing that dealing was fair and client was fully advised, *held* for jury.

7. Trial ⚷191(3), 240

In action to recover for attorneys' services, portions of requested instructions which were argumentative, closely allied to instruction on facts and based on assumption that relationship of attorney and client existed at time of contracting, as to which there was conflicting evidence, *held* properly denied.

◆

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by William G. Bonelli and another, doing business as Bonelli & Miller, against W. E. Conrad. Judgment for plaintiffs, and defendant appeals.

Affirmed.

McManus & Caldwell, of Los Angeles, for appellant.

Hal Hughes, Maurice J. O'Brien, both of Los Angeles, for respondents.

WILLIS, Justice pro tem.

This is an action to recover for attorneys' services, tried before a jury which rendered a verdict in favor of plaintiffs. From the judgment entered thereon, defendant appeals.

Plaintiffs were partners in the practice of the law from January 1, 1929, until the first of the year 1932. On January 13, 1930, plaintiff Bonelli and one Mark S. Feiler, also an attorney, executed a written contract with defendant wherein it was provided that, in consideration of the attorneys procuring for appellant a change of zoning from zone B to zone C of the zone area in Los Angeles in which certain of appellant's property then was located, he (appellant) would pay to the attorneys the sum of $5,000 at the time when such zoning change went into effect, otherwise appellant was obligated to pay them nothing. On September 19, 1930, appellant executed a document in effect declaring that it was his understanding that he was to pay the attorneys above named the sum of $5,000 in consideration of their procuring a rezoning of the "southeasterly corner of Sunset Boulevard and Fairfax Avenue, Los Angeles * * * from the present apartment house zone to a commercial zone, so as to permit construction on the above premises of business property," this agreement to be in force and effect for a period of 90 days from its date. After the expiration of that period, and on February 11, 1931, Bonelli and Miller executed with appellant a new contract wherein it was recited that appellant desired to employ respondents to do the necessary legal work "in connection with the obtaining of special permits for business development of the following described property or placing the same in Zone 'C' by valid ordinance of the city of Los Angeles." Then follows a description of the property, being the same as described in the previous agreements, and the covenant: "Now therefore, the first party does hereby employ the second party for the purposes hereinabove set forth and agrees to pay the sum of Five Thousand ($5,000.00) Dollars, and the second parties accept such employment and the sum hereinabove set forth as consideration for their services, which said sum is to be paid upon demand to said second parties by the first party when the above described property has been placed in Zone 'C' by valid ordinance or special permit for business uses of the city of Los Angeles. It is understood and agreed that this employment shall be for ninety (90) days from the date hereof." Prior to the expiration of the 90-day period, and on May 9, 1931, a renewal or extension of this last agreement was executed in the form of a duplication thereof in words and figures, except as to date and period of existence, which was made to read 60 days from and after May 9, 1931. On June 27, 1931, an ordinance of the city of Los Angeles was duly adopted and approved, wherein the city council granted appellant a "conditional variance from the provisions" of the zoning ordinance, under section 4 thereof, "so far as variance is necessary to erect a business building" on the property of appellant at the southeasterly corner of Sunset boulevard and Fairfax avenue, provided (a) that the building conform substantially to sketch submitted by appellant; (b) that the plans for the building be submitted to and approved by the city planning committee prior to the issuance of building permits; (c) that the building permits be applied for within six months of the date of this ordinance; and (d) that the department of building and safety issue the necessary permits upon the publication of this ordinance.

On July 29, 1931, respondents made written demand on appellant for payment of the $5,000, reciting in their letter "that the ordinance granting a special permit for business uses on your property * * * will become effective as a valid ordinance on midnight of July 29, 1931," and that "under the terms of our agreement of May 9, 1931, the sum of $5,000.00 immediately becomes due and payable upon demand when such ordinance becomes effective." To this letter appellant replied in writing on August 1, 1931, stating: "It is my desire and aim to pay you your $5,000.00 at the very earliest moment possible. I realize just how hard you worked on that zoning, and knowing of your efforts was the main reason I kept extending the time, in order for you to complete your job. * * * I want to assure you, this obligation will be met at the very earliest possible moment I can get hold of any part of this amount, and I am putting forth every possible effort to raise same."

On October 6, 1931, respondents began this action by filing their complaint, wherein they set forth three causes of action, viz.: (1) For $5,000 upon a quantum meruit; (2) for $5,000 upon account stated; and (3) for $5,000 upon the contract of May 9, 1931. Appellant answered, denying specifically the conventional allegations of the first and second causes, and as to the third cause admitted the signing of the contract set forth, but alleged in effect that it was procured by false and fraudulent representations and by exercise of undue influence, and that at the time the contract was entered into respondents were employed as his attorneys to cause his property to be placed in zone C, and that respondents have failed so to do, and that the work done by respondents is of no avail or value to appellant, and that the sum of $5,000, stated in the contract, is in excess of the fair, reasonable value of any services rendered or performed by respondents pursuant to said contract.

At the trial before a jury, appellant required an election as to the cause of action to be relied upon by respondents, and thereupon the court, with the consent of respondents, eliminated the first cause of action from the case, and trial proceeded on the causes for account stated and breach of the contract of May 9, 1931. At the close of trial, the court denied appellant's motion for an instructed verdict on the account stated cause, and also on the breach of contract clause, and submitted both causes to the jury under instructions accompanied by two interrogatories, which were the outgrowth of, and predicated on, two important questions pressed at the trial by appellant. The first of these had reference to the meaning of or construction to be placed on the written contract, appellant contending that it was intended to mean, and that he understood it to mean, that respondents were obligated to procure a rezoning from B zone to C zone, while respondents claimed it meant, and was understood by all parties to mean, that they were to procure either a rezoning from B to C, or a special permit for business development of appellant's property. So the first interrogatory required the jury to answer the question: "Do you find from all the evidence, under the instructions of the court, that the parties, at the time of entering into the contract of May 9, intended and understood the contract to mean that the services required of the plaintiffs would be fully performed if the plaintiffs procured a special permit, and that such special permit was finally procured in accordance with such understanding?" To this the jury answered, "Yes." The second of these questions arose out of the cause of action on account stated, and, because the validity of the contract was attacked, respondents successfully urged the retention in the case of the cause of action on account stated, to be fallen back upon for relief in case the jury should find that respondents had not performed the contract as they might interpret it, or that the contract was invalid by reason of undue influence in its procurement while respondents were occupying the status of attorneys for appellant. So the second interrogatory required the jury to answer this question: "Do you find, under the evidence in this case and the instructions of the court, that the defendant, upon receipt of the letter informing him of the services which had been performed by the plaintiffs, and demanding payment of the $5,000.00 therefor, with full knowledge of the services which had been performed by the plaintiffs, and of the results accomplished thereby, agreed to make such payment with such full understanding of the facts?" To this the jury answered "Yes," and with their answers rendered their verdict in favor of plaintiffs for the sum of $5,000.

These answers to these questions, considered in connection with the verdict, make it quite clear that the jury had resolved the issue of the meaning and understanding by the parties of the contract in respondents' favor, and had based its verdict on the third cause of action.

[1] The foregoing statement appears necessary to properly approach and dispose of appellant's propositions as set forth in his brief herein. His first contention is that the evidence showed that the written contract had not been complied with; and to support that claim he argues that there is an ambiguity in the contract in respect to whether respondents were to obtain a change from zone B to zone C or to obtain a special permit for business development of appellant's property, and that under familiar rules of construction the contract should have been construed so as to require a rezoning from B to C before respondents would become entitled to the agreed compensation. This issue was fully tried and submitted to the jury under appropriate instructions, and by its verdict the issue was decided against appellant's contention. That there is substantial and convincing evidence to support the implied finding of the jury is manifest in the record.

The first contract of January 13, 1930, provided that a rezoning from B to C zone was to be obtained before the compensation would be earned. On September 19, 1930, appellant modified this agreement by his declaration of understanding that he was to pay the $5,000 in consideration of the attorneys procuring a rezoning of his corner property from the present apartment house zone (which was B zone) to a commercial zone (C), so as to permit construction on the premises of business property, and this new employment was limited in time to 90 days from that date. On February 11, 1931, the contract here involved was first executed, being renewed on May 9, 1931. By its terms appellant employed respondents to obtain special permits for business development of his corner property or placing it in zone C. In the clause providing for time of payment an uncertainty appears, owing to the arrangement of words and clauses therein, in the following quoted portion: "Which said sum is to be paid upon demand * * * when the above described property had been placed in zone C by valid ordinance or special permit for business uses of the city of Los Angeles." Appellant contends that this must be construed to require a placing of the property in zone C by ordinance before he became obligated to pay.

The history of the transactions and the language of the contract, taken into consideration with the meaning of the terms "zones" and "special permits" and "conditional variance," all tend to support the jury's implied finding as to the intent and understanding of the parties to the contract, and fully sustains their affirmative answer to the interrogatory submitted to them on that subject. Appellant testified quite positively that he wanted a "spot zone" for his property. It is clear that is precisely what he received by virtue of the ordinance which respondents procured for his benefit. This ordinance terms the isolation or exemption of parcels of property in an established zone from the general restrictions of the particular zone as a "variance" from its provisions. The parties in their contract described it as "special permit for business development." In common business parlance, this same official act is called "spot zoning." It simply means that a parcel or "spot" in an established zone is excepted from its restrictions and released to other uses, permitted under another zone, as distinguished from a rezoning of the entire zone area, or from the conversion of one zone into another zone by designation of descriptive letter.

[2, 3] Appellant's second proposition is based on the claim that the undisputed evidence showed that, at the time the contract sued upon was executed, the relationship of attorney and client existed between respondents and appellant, and that therefore the burden was cast upon respondents to show by extrinsic evidence that the client acted with full knowledge of all the facts and understood their effect in signing the contract, and that the dealing was fair and just and the client fully advised. This issue of relationship was submitted to the jury under proper instruction, and their implied finding was contrary to appellant's contention. The evidence fully supports that finding. The evidence showed that the contract of January 13, 1930, as modified and as limited in duration of term by that of September 19, 1930, had expired on December 19, 1930, and the Attorneys Bonelli and Feiler had ceased all work thereunder. It was not until February 11, 1931, that the new contract with respondents, one of whom was a new party, was entered into after nego-

tiations. In the absence of proof of employment after December 19, 1930, it is clear that the relationship between Bonelli and Feiler as attorneys and appellant as client terminated on the date of expiration of their previous employment, and in entering into the contract of February 11, 1931, which was in turn extended by that of May 9, 1931, respondents would be treating with appellant as strangers. The presumption against validity of a contract entered into by parties under the relationship of attorney and client does not attach to a contract by which the relation is originally created and the compensation of the attorney fixed. In agreeing upon terms of such a contract, the parties deal at arm's length. Cooley v. Miller & Lux, 156 Cal. 510, 524, 105 P. 981; Hicks v. Drew, 117 Cal. 305, 49 P. 189; Boardman v. Crittenden, 52 Cal. App. 438, 450, 198 P. 1020.

[4, 5] The third and fourth propositions advanced by appellant are based on the trial court's submission to the jury's consideration of the second cause of action, founded on account stated; the ground of error assigned being that this was a violation of the established rule that an account stated cannot be based upon the same demand as is involved in an express contract. Appellant cites the case of Bennett v. Potter, 180 Cal. 736, 183 P. 156, 160, upon this proposition. That case is not in point on the facts, as therein the sole evidence of account stated consisted of testimony of conversations of the parties concerning compensation, between whom a contract in writing existed by which compensation was fixed. The court properly said: "To allow a written contract to be thus altered by an oral statement of account, or by any statement not agreed to in writing by the debtor, would violate the rule of the Code that 'a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise.' Civ. Code, § 1698." Appellant also cites the case of Rio Linda Poultry Farms v. Fredericksen, 121 Cal. App. 433, 9 P.(2d) 262, 263, wherein the court, following the language of Bennett v. Potter, supra, stated: "It is not every debt which can form the basis of an account stated or an action thereon. It cannot become a substitute for an action of debt upon a specialty, such as a promissory note. In such a case no subsequent statement of the amount due thereon, although agreed to by the payer, can supersede the special promise so as to form the basis of an action as upon an account stated to recover the original debt. The written promise being higher evidence of the debt and the debtor being already bound thereby, there could be no necessity for a resort to a subsequent statement and promise to pay."

In the instant case appellant had attacked the validity of the written contract of employment and sought to have it declared invalid. If he had succeeded in that effort, the effect would have been to eliminate from existence any written contract between the parties. In that event a new and different contract founded on the letter of July 29, 1931, and the answer thereto of August 1, 1931, and herein pleaded in the conventional form of account stated, would have become available as a foundation for recovery of the amount agreed upon by such subsequent contract. Under this state of the case, the lower court did not err in submitting the account stated cause of action to the jury under the instructions given accompanied by the two interrogatories. By its answers and verdict the jury found that the written contract was valid and that $5,000 was the agreed compensation earned thereunder. The direct effect of this finding was to render harmless to appellant the submission of the other cause of action, and the evidence supporting the cause of action for account stated became pertinent probative matter tending to sustain the jury's finding that appellant understood the written contract to mean that, upon receiving a special permit for him, respondents would have earned the agreed compensation, as contended for by respondents under the third cause of action.

[6, 7] The fifth proposition relates to the giving and refusing of instructions. The court did not err in refusing to instruct the jury that the undisputed evidence showed that the contract in question was entered into while the relationship of attorney and client existed. This was a question of fact in issue before the jury, and the court properly refrained from invading its peculiar province. As to the portions of instruction No. 1, proposed by appellant, which were stricken and not given by the court, it is clear no error can be predicated thereon. The portions stricken were argumentative and too closely allied to instructing on facts to be proper subject of instructions by the court, and were all based on the assumption that the evidence of the relationship between the parties, at the time of contracting, was undisputed. The same may be said of proposed instruction No. 2, refused by the court, which clearly was founded on the assumption as a fact that the contract sued upon was entered into during the existence of the relationship of attorney and

client. The instructions as given by the court as a whole and in the several parts thereof correctly stated the law applicable to the peculiar character and features of the case, and therein the rights of appellant were effectively safeguarded.

Judgment affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

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1 Cal.App.2d 670

GRIFFITH v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 9979.

District Court of Appeal, Second District, Division 2, California.
Oct. 30, 1934.

Hearing Denied by Supreme Court
Dec. 27, 1934.

Certiorari 🔑29

Writ of review does not lie to determine correctness of inferior court's rulings on questions arising in course of proceeding preliminary to final determination (Code Civ. Proc. § 1068, and § 726 as amended by St. 1933, p. 2118).

Petition by E. G. Griffith against the Superior Court in and for Los Angeles County and the Honorable Charles L. Bogue, as Judge thereof, for a writ of review.

Writ denied.

William Ellis Lady, of Los Angeles, for petitioner.

Frank S. Hutton, of Los Angeles, for respondents.

WILLIS, Justice pro tem.

This is a proceeding in certiorari, and in our view of the case no extended or detailed statement of facts or discussion of law is necessary.

In a pending action to foreclose a mortgage on real property, the superior court entered an order appointing an appraiser to appraise the property in question under the provisions of section 726 of the Code of Civil Procedure as amended in 1933 (St. 1933, p. 2118); such appraisement being usable as evidence thereafter at a trial of the case to mark the extreme limit of possible deficiency judgment therein.

A writ of review lies only when the inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal nor, in the judgment of the court, any plain, speedy, and adequate remedy. Code Civ. Proc. § 1068. The language of the section limits it to cases where the tribunal "has exceeded" its jurisdiction. It does not lie to determine the correctness, in point of law, of rulings or decisions made by such court upon questions arising in the course of the proceeding or cause preliminary to a final determination regarding the action which it is asked to take in the matter. Holabird v. Railroad Commission, 171 Cal. 691, 154 P. 831; People v. County Judge, 40 Cal. 479; Sayers v. Superior Court, 84 Cal. 642, 24 P. 296; Gumilla v. Industrial Accident Commission, 187 Cal. 638, 203 P. 397; Howe v. Superior Court, 96 Cal. App. 769, 274 P. 992.

The writ is denied.

We concur: STEPHENS, P. J.; DESMOND, J.

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1 Cal.App.2d 639

In re GIAMBASTIANI'S ESTATE.

HINES, Administrator of Veterans' Affairs and United States Veterans' Administration, v. GIAMBASTIANI.

Civ. 9962.

District Court of Appeal, Second District, Division 2, California.
Oct. 29, 1934.

1. Guardian and ward 🔑163

Orders settling guardian's accounts are not conclusive and do not preclude probate court at hearings on subsequent accounts from re-examining former accounts, nor from correcting, revising, or modifying amounts of items, or from entirely disallowing them (Probate Code, § 1502).

2. Guardian and ward 🔑30(1)

Whether guardian's advances for ward were voluntary is question of intention, and, if at time services were originally rendered, or advances made, they were intended to be gratuitous, and were tendered or made without any expectation of remuneration or return, they cannot later be converted into pecuniary demand (Probate Code, § 1502).

3. Appeal and error ⚿996
Where two or more inferences may reasonably be deduced from certain state of facts or circumstances, reviewing court is not permitted to substitute its deductions for those of trial court.

4. Insane persons ⚿42(3)
Trial court's finding that brother's advances and expenditures of money for his incompetent brother for whom he subsequently was appointed guardian were not voluntary *held* conclusive, where finding was based on reasonable inferences from evidence (Probate Code, § 1502).

5. Army and navy ⚿51
If items for which reimbursement was sought by guardian of insane person, and which represented advances made and expenses incurred for use of insane person by guardian while acting as guardian de facto, were of such character as would warrant their allowance had they arisen during guardianship de jure, then they did not constitute "creditor's claim," and hence were subject to reimbursement from funds received by insane person from Veterans' Administration (Probate Code, § 1502; World War Veterans' Act of 1924, § 22 [38 USCA § 454]).

6. Army and navy ⚿51
As respects brother's right to reimburse himself for expenses incurred from funds received by insane brother from Veterans' Administration, finding that brother acted as guardian de facto, or as trustee of his insane brother from 1919 to time of acquiring his de jure status in 1929, would not be disturbed, where transcript of evidence revealed substantial evidence to support finding (Probate Code, § 1502; World War Veterans' Act of 1924, § 22 [38 USCA § 454]).

7. Guardian and ward ⚿148
Quasi guardian or guardian de facto acting bona fide is entitled to reasonable credits for maintenance of beneficiary and for expenditures incurred on his account, and such guardian is trustee of beneficiary's estate, and accounting must be deemed in nature of accounting in equity, where it is presented in probate court subsequent to inception of de jure status and must be determined on equitable principles (Probate Code, § 1502).

8. Guardian and ward ⚿30(1)
Criterion for determining whether past maintenance should be allowed to guardian is whether a chancery court would have authorized it in advance (Probate Code, § 1502).

9. Guardian and ward ⚿6
Guardian de facto is subject to all duties and liabilities of a guardian.

10. Army and navy ⚿51
Claim by guardian de jure for reimbursement for expenses incurred while acting as guardian de facto was not "creditor's claim," and hence was subject to reimbursement from funds received by ward from Veterans' Administration, since it was an allowance or credit sought in an accounting presented in regular course by guardian de jure, in which accounting on equitable principles guardian should be allowed for all proper disbursements for benefit of ward (Probate Code, § 1502; World War Veterans' Act of 1924, § 22 [38 USCA § 454]).

11. Guardian and ward ⚿30(1)
Question of amount and necessity, or propriety of advancements by guardian to ward, is question of fact for probate court to determine on proofs before it, and, if amount so advanced is found to be not disproportionate to value of ward's estate, or his condition in life, it should be allowed (Probate Code, § 1502).

12. Army and navy ⚿51
Claim by de facto guardian for expenditures on behalf of ward set up in his subsequent accounting as guardian de jure is not "claim of a creditor" within Veterans' Act providing that compensation, insurance, and maintenance and support allowance payable to veteran shall not be subject to claims of creditors, but is a charge arising during administration of ward's affairs and estate as if under a de jure guardianship (Probate Code, § 1502; World War Veterans' Act of 1924, § 22 [38 USCA § 454]).

13. Army and navy ⚿51
Without previous de facto guardianship, advances made or claims created against ward may not be paid out of funds derived from Veterans' Administration, but advances properly made by guardian de jure in course of his administration may be paid from that source since funds are only exempted from claims of creditors of veteran (Probate Code, § 1502; World War Veterans' Act of 1924, § 22 [38 USCA § 454]).

◆

Appeal from Superior Court, Los Angeles County; Florence Bischoff, Judge pro tem.

In the matter of the estate and guardianship of Americo Giambastiani, an incompetent person. From an order settling the accounts of Egisto Giambastiani, guardian of the person and estate of Americo Giambastiani, Frank T. Hines, Administrator of Veterans' Affairs and the United States Veterans' Administration, appeals.

Affirmed.

H. C. Veit, of Los Angeles, and J. C. Shunk, for appellant and proponent.

Albert Sidney Brown, of Los Angeles, for respondent and petitioner.

WILLIS, Justice pro tem.

The ward herein was discharged from the United States Army at Camp Lewis, Wash., in January, 1918, for disability, and was at once brought back to Los Angeles, his home, by his brother, who is respondent guardian herein. Deeming his brother incompetent to care for himself or his property, respondent took charge of him, managed and paid charges and expenses of his property affairs, and supported and maintained him, chiefly out of respondent's private resources, until respondent was regularly appointed as his guardian on October 9, 1929. During this interim the ward was owner of a one-fifth interest in a residence property and owned some stock in a feed and fuel corporation of which respondent was manager, all in Los Angeles county, a lot in Orange county, and a life and health insurance policy. On August 15, 1927, the ward was adjudged an insane person and committed to Norwalk state hospital, where he has since remained. On September 25, 1931, respondent filed his first account as guardian, showing expenditures for and on behalf of the ward over the period from January, 1918, to date of account in the sum of $11,844.78, with credits from stock on dissolution of the corporation mentioned above in 1927, from the health policy, and from the United States Veterans' Administration as compensation, in the sum of $525.16, aggregating the sum of $3,549.56, and leaving a balance of $8,295.22 advanced and expended by respondent. Without objection, this account was approved and settled as presented, on October 19, 1931, with certain allowances made for guardian's and attorney's services.

On May 27, 1932, on appellant's petition, the probate court entered an order exempting funds received from the Veterans' Administration from payment of claims of creditors. On February 16, 1933, on respondent's petition, the court entered an order allowing him to reimburse himself for these advances out of moneys received from Veterans' Administration under the provisions of the World War Veterans' Act, or from any source, but only after sufficient funds coming into the estate have been used for the proper support and maintenance of the ward. On March 24, 1933, respondent filed his second account current, showing expenditures during the period in the total sum of $645 and receipts aggregating $3,589.14, of which amount the sum of $2,645.81 was received from Veterans' Administration under said act. Such account also showed a credit of $2,278.64 against the former balance of advances. To this account appellant, under authority of the act above mentioned, filed objections, and, after a hearing and trial, the probate court overruled all objections and approved and settled the second account, on August 5, 1933. By this second account and the order settling it respondent was allowed a credit of $2,278.64 against the balance of $8,295.22 previously established as a balance of his advancements on behalf of the ward, leaving a present balance of $6,016.58 on such previous advancements, with the sum of $500 funds on hand in bank to the credit of the ward, together with a continuing income of $100 per month from the Veterans' Administration under said act.

After hearing on this account and objections thereto, the probate court filed findings and conclusions, wherein, among other matters, the court found that the claim of respondent for past advances before appointment was not the claim of a creditor; that respondent acted as "guardian de facto, or as trustee" of said ward from the time of the latter's discharge from the Army in 1918 until the time of appointment of respondent as guardian in 1929; that the expenditures made by respondent on behalf of the ward prior to the appointment in 1929 were not voluntary; that the funds received from the Veterans' Administration were not exempt from respondent's claim for reimbursement, and that such claim is a proper charge against the estate and any funds coming into the estate from any source whatever. From the order settling this second account, this appeal is taken.

On this record appellant predicates three claims of error, namely: (1) That the moneys advanced and maintenance furnished by respondent prior to his appointment were voluntary, and that it was error to decide to the contrary; (2) that respondent's claim for such past advances and expenses paid prior to his appointment was the claim of a creditor, and that it was error to decide contrariwise, thereby avoiding the effect of the exemption provided in the World War Veterans' Act; (3) that respondent did not act as guardian de facto prior to his appointment, and that it was error so to decide. As an alternative, appellant claims error in allowing credit to respondent as a de facto guardian for sums in excess of the amount received by him for the ward during such de facto period of guardianship.

[1] As claimed by appellant and conceded by respondent, it is the recognized rule in this state that orders settling guardian's accounts are not conclusive and do not preclude the probate court at hearings on subsequent accounts from a re-examination of former accounts, nor from correcting, revising, or modifying the amount of any item or from entirely disallowing the same. Guardianship of Cardwell, 55 Cal. 137.

[2-4] Appellant's first point is that the court erred in finding that respondent's advances and expenditures of money for his brother up to his appointment as guardian were not voluntary. It has been held that in all cases of this character the question is one of intention. If at the time the services were originally rendered or advances made they were intended to be gratuitous, prompted by friendship, kindness, and the relation existing between the parties, and were tendered or made without any expectation of remuneration or return, they cannot later be converted into a pecuniary demand. Newbert v. McCarthy, 190 Cal. 723, 214 P. 442. The evidence in this case, which is here before us in the reporter's transcript, presents a case wherein there is conflict and as to which reasonable minds may differ as to inferences and implications to be drawn therefrom. It cannot be said that the evidence does not support the finding. It appears clear enough that from the evidence it may be inferred that respondent in making the advances and in expending his own money for support and care of his brother did so with expectation and intention of reimbursement to the extent of his brother's assets or income. The evidence shows that during the period prior to his appointment he did in fact apply the credit of $1,200 on dissolution of the corporation in which the brother held stock, and that he received and credited himself with some insurance health payments. The intention of reimbursement being thus present and partially executed in respect to the then known property and assets of the brother, it would with equal force and similar effect attach to any subsequently discovered or acquired assets or property, such as appeared later in the form of veteran's compensation from the government. This court might, if free to do so, decide to the contrary on the evidence herein; but, where two or more inferences may reasonably be deduced from a certain state of facts or circumstances, a reviewing court is not permitted to substitute its deductions for those of the trial court. Wilbur v. Wilbur, 197 Cal. 1, 239 P. 332. The finding being based on reasonable inferences from the evidence, we are bound thereby, and may not disturb it.

[5] The next two questions are so interdependent that the answer to one will determine the answer to the other, and we shall therefore consider them together. For, if the items for which reimbursement is sought and which have been allowed represent the advances made and expenses paid for the use of the beneficiary by respondent as his guardian de facto, and are of such character as would warrant their allowance had they arisen during a guardianship de jure, then they could not be said to constitute the claim of a creditor. For by section 1502 of the Probate Court it is provided that, when a guardian has advanced for the suitable support, maintenance, or education of his ward an amount not disproportionate to the value of the ward's estate or his condition of life, and the same is made to appear to the satisfaction of the court by proper vouchers and proofs, the guardian must be allowed credit therefor in his settlement.

[6-10] The probate court found that respondent acted as "guardian de facto or as trustee" of his brother from 1918 to the time of acquiring his de jure status in 1929. An examination of the transcript of the evidence taken reveals substantial evidence to support this finding; hence under the well-known rule this court will not substitute another or different one. As quasi guardian or guardian de facto acting with bona fides, one is entitled to reasonable and proper credits for maintenance of the beneficiary and for expenditures incurred on his account. Such a guardian is a trustee of the beneficiary's estate, and the accounting must be deemed in the nature of an accounting in equity, where it is presented in the probate court subsequent to the inception of the de jure status, and must be determined on equitable principles the same as in an action in equity for an accounting by such trustee. The criterion for determining whether a past maintenance should be allowed is whether a chancery court would have authorized it in advance. In re Beisel's Estate, 110 Cal. 267, 40 P. 961, 42 P. 819; Estate of Schluter, 209 Cal. 286, 286 P. 1008; Estates of Boyes, 151 Cal. 143, 90 P. 454; Estate of Clanton, 171 Cal. 381, 153 P. 459. A guardian de facto is subject to all the duties and liabilities of a guardian. In re Smith's Appeal, 158 Mich. 174, 122 N. W. 564. The probate court, having once found that respondent was guardian de facto,

would, on natural and logical sequence, conclude that respondent's claim of reimbursement for past expense and maintenance was not the claim of a creditor, but was allowance or credit sought in an accounting presented in regular course by him as subsequent guardian de jure; in which accounting, on equitable principles, he should be allowed for all proper disbursements for the benefit of the ward. In re Beisel's Estate, supra; Kelly v. Kelly, 89 Mont. 229, 297 P. 470.

[11] The contention of appellant that it was error to allow respondent for expenditures in excess of the amount received by him for his ward when later claimed as reimbursement in his accounting does not present a question of law. The question of amount and necessity or propriety of advancements is one of fact for the probate court to determine on proofs before it, and, if the amount so advanced is found to be not disproportionate to the value of the ward's estate or his condition of life, it should be allowed. Section 1502, Probate Code. The court below by implication found that the amounts allowed were proper under this rule of law, and such finding will not be here disturbed.

[12, 13] Some considerable stress is laid by appellant on the claim that moneys received from the Veterans' Administration for the incompetent herein are exempt from the claim of reimbursement under the World War Veterans' Act. Section 22 of that act (38 USCA § 454) provides that: "The compensation, insurance and maintenance and support allowance payable * * * shall not be subject to the claims of creditors of any person to whom an award is made." A claim of a de facto guardian for expenditures on behalf of the ward, set up in his subsequent accounting, is not the claim of a creditor. It is a charge arising during administration of the ward's affairs and estate, the same as if under a de jure guardianship. Without a previous de facto guardianship, advances made or claims created may not be paid out of funds derived from the Veterans' Administration. Those properly made by a guardian de jure in course of his administration may be paid from that source because the funds are only exempted from claims of creditors of the beneficiary soldier. In re Estate of Ferarazza, 219 Cal. 668, 28 P.(2d) 670.

We find no error in the proceedings in the probate court; nor do we find anything therein that would operate to the detriment or prejudice of the incompetent. Over the long period of his disability, he has been faithfully cared for and supported by respondent, and the order appealed from operates only to do justice between the ward and his guardian, at the same time insuring proper care and maintenance of the ward out of his soldier's allowance.

The order is affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

1 Cal.App.2d 605

HAVERSTICK et al. v. SOUTHERN PAC. CO.

Civ. 5196.

District Court of Appeal, Third District, California.

Oct. 25, 1934.

Hearing Denied by Supreme Court Dec. 24, 1934.

1. Railroads 🔑24(1)

Motion to quash summons for misnomer of defendant railroad company was properly denied, where complaint was amended by inserting defendant's true name and alias summons, giving such name, served on proper officer of defendant, with copy of amended complaint (Code Civ. Proc. § 473).

2. Railroads 🔑25

Court had authority to permit amendment of complaint in action against railroad company to state defendant's name correctly after filing of motion to quash service of summons for misnomer (Code Civ. Proc. § 473).

3. Appearance 🔑24(1)

General appearance by filing answer after denial of motion to quash summons waives all defects therein.

4. Appeal and error 🔑843(2)

Error, if any, in denying motion to quash summons, became moot question and immaterial on filing of demurrer and answer, which gave court jurisdiction of cause and defendant.

5. Railroads 🔑484(1)

Railroad brakeman's negligence in continuing to scatter burning embers by using fire extinguisher on fire beneath floor of coach while high wind prevailed, until grass fire, resulting in destruction of property and injury to owner, was started, *held* for jury.

6. Railroads 🔑484(1)

Train crew's negligence in leaving scene of grass fire, started by burning embers from coach, without making substantial effort to subdue flames, *held* for jury.

7. Railroads 🔑482(1)

Evidence in action against railroad company for destruction of property and personal injuries, resulting from grass fire started by burning embers from defendant's coach, *held* sufficient to support jury's finding of negligence of defendant's employees in continuing to scatter embers by use of fire extinguisher on coach fire and leaving scene without making substantial effort to subdue grass fire.

8. Damages 🔑62(3)

Owner of property in danger of destruction because of negligent cause instituted by another must take all reasonable precautions to minimize damages by lessening destruction.

9. Negligence 🔑61(1)

Negligence of company or person setting fire to property, rather than owner's attempt to save it, is proximate cause of resulting injury to owner, in absence of contributory negligence.

10. Negligence 🔑75

Personal injuries to owner of property in attempt to prevent its destruction by fire because of railroad employees' negligence give rise to cause of action against railroad company for damages.

11. Damages 🔑227

Statutes declaring person negligently suffering fire to extend beyond his own land liable in treble "damages to the party injured" apply to personal injuries as well as property loss (Pol. Code, § 3344; Civ. Code, § 3346a).

[Ed. Note.—For other definitions of "Damage; Damages," see Words & Phrases.]

12. Negligence 🔑61(1)

Negligent act, necessitating another's performance of duty, not such performance itself, is proximate cause of injury incurred therein.

13. Courts 🔑107

Facts of case must be considered before limited language of court's opinion therein can be held controlling in later case.

14. Appeal and error 🔑949

Primarily, trebling of damages for injuries by fire negligently suffered to extend beyond land of one setting it is for trial court (Pol. Code, § 3344; Civ. Code, § 3346a).

Appeal from Superior Court, Amador County; A. Caminetti, Jr., Judge.

Action by Franklin Allen against the Southern Pacific Company. From a judgment for plaintiff, defendant appealed and Dorsolina M. Haverstick and others, executrices of the will of plaintiff, were substituted as respondents after plaintiff's death.

Affirmed.

Levinsky & Jones and Tom B. Quinn, all of Stockton, for appellant.

Snyder & Snyder, of Jackson, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

Franklin Allen, now deceased, the plaintiff, had judgment against the defendant in this action, for and on account of the destruction of property and personal injuries alleged to have been suffered on account of a fire negligently allowed to escape from a car belonging to the defendant.

The facts disclosed by the record show that on or about the 19th day of May, 1931, the defendant was operating what is called the shuttle train between Ione, in Amador county, and Galt, in Sacramento, county. This train makes one trip each way, daily. The route traversed is across rolling valleys and foothills. The train, on the particular day, consisted of an engine, 18 cars, and a combination passenger car and baggage coach operated by a crew of five men, to wit, engineer, fireman, conductor, brakeman, and express messenger. The combination car is divided; one portion being used for passengers, the other portion for baggage and express matter.

During the springtime high winds prevail over the section of the country traversed by the railroad, and the testimony is to the effect that on the 19th day of May, 1931, a wind was blowing from north to south, and moving at a rate of from 65 to 70 miles per hour. When the train had reached a point about a mile and a half from Carbondale, the discovery was made that the combination coach was on fire. The train stopped; a fire extinguisher was taken from the combination coach and used by the brakeman in an attempt to extinguish the fire from below. It appears that the fire was burning in the space between the lower and upper floors of the combination coach; the lower part of the sills of the coach being lined with tongue and groove lumber. The upper part, or inside floor of the coach was lined with a double covering of tongue and groove lumber. The intervening space between the two floors, or rather between the tongue and groove lumber on the lower side of the sills and the lumber constituting the floor of the coach, giving a space of about six inches, was filled with sawdust and other material, for the purpose of deadening the noise. It was this material that was discovered to be on fire.

In the use of the fire extinguisher, it appears that the force exercised by the liquid contained in the extinguisher was such that it scattered the burning embers in all directions. These burning embers were caught up by the high wind prevailing at the time and place mentioned, carried beyond the right of way of the company, and ignited a grass field adjoining the company's right of way. It was the spreading of this fire that caused the damage to the plaintiff's property, and also resulted in his personal injuries while attempting to save property belonging to him, imperiled by the fire thus started.

The record shows that the grass fields were very dry, and the fire spread with exceeding rapidity, and soon got beyond the control of the train crew, only one of whom, the conductor, it appears attempted to extinguish the fire after it had been so started in the grass adjoining the defendant's right of way. His testimony is that he made a rush for the fire, but was unable to extinguish it. Efforts were made by the train crew, by means of taking the drinking tanks of the combination car, cutting a hole in the floor and pouring the contents thereof upon the burning sawdust. While the fire was not extinguished, it appears to have been partly subdued, and the train then moved on to Carbondale, the burning car was stopped alongside of a water car and the fire extinguished, after which the train moved on to Ione some miles distant. After reaching Carbondale, the conductor notified a section crew, and it appears that this crew went back and attempted to extinguish the flames.

The record shows that in the beginning of the action there was a misnomer of the defendant; the defendant appeared specially and moved to quash the service of summons. In the meantime the plaintiff moved the court to amend his pleadings by inserting the true name of the defendant, after which an alias summons, giving the true name of the defendant, together with a copy of the amended complaint, setting forth the true name of the defendant, was served upon the proper officer designated by the appellant as the person upon whom service of summons might be made.

The motion to quash being denied, the defendant filed a demurrer, and also an answer to the plaintiff's amended complaint. These pleadings made no pretense of attempting to preserve the right to further object to the jurisdiction of the court on account of any defect in the summons.

Upon this appeal four propositions are presented for consideration:

I. Did the court err in denying appellant's motion for nonsuit?

II. Is the verdict supported by the evidence?

III. Did the court err in denying appellant's motion to quash summons and service thereof?

IV. Did the court err in trebling the damages?

[1] While both the appellant and the respondents have argued at length the alleged error of the court in denying appellant's motion to quash the summons, a slight examination of the authorities reveals that the question tendered for consideration has been definitely decided in favor of the correctness of the ruling of the court for a great many years.

Section 473 of the Code of Civil Procedure, being but a re-enactment of the Practice Act (St. 1851, p. 60, § 68) as amended by Statutes of 1865–66, page 843, and by Amendments to the Codes 1873–74, p. 302, provides, that it has ever since provided, that "The court may in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party," etc.

Again, beginning with cases as early as Suydam v. Pitcher, 4 Cal. 280, it has been held that, where a party appears specially, moves the court to quash the service of summons, and upon the denial of such motion thereafter appears by demurrer or answer, all objections to the defect in the summons are thereby waived.

[2] That the court had authority in this case to permit the amendment of the complaint to correctly state the name of the defendant is definitely settled by the opinion in the case of Thompson v. Southern Pacific Company, 180 Cal. 730, 183 P. 153.

[3] That a general appearance by filing an answer after denial of motion to quash a summons waives all defects therein is likewise settled beyond controversy in this state

by the opinion of the Supreme Court in Remsberg v. Hackney Mfg. Co., 174 Cal. 799, 164 P. 792, and the cases there cited.

[4] In the light of the authorities just cited, it must be held that the court did not err in denying the appellant's motion to quash summons, and, even if the court did err in so doing, it at once became a moot question and immaterial immediately upon the filing of a demurrer and answer by the appellant, which, under the authorities, gave the court jurisdiction of the cause, and also over the defendant.

[5] Propositions I and II as to whether the court erred in denying appellant's motion for nonsuit, and whether the verdict is supported by the evidence, may properly be considered together.

As we have stated, the burning embers scattered by the force of the fire extinguisher at a time when the wind was blowing at the rate of from 65 to 70 miles an hour caused the fire to be set in the dry grass alongside the railroad right of way. The wind was blowing from the north to the south. The premises set on fire were to the south of the railroad. No real explanation is given as to how the fire started, although it does appear that some eight days previously the coach in question was pulled either through or alongside of a fire burning grass on the defendant's right of way. That is the only explanation which appears in the record from which it was concluded that the fire was burning or smoldering in the sawdust until it gathered sufficient headway, on this particular windy day, to break out and become visible to the defendant's employees.

While the appellant sets out at considerable length all the testimony concerning the equipment of the car, the number of years it had been in use, the fact that not a great while previous to the 19th day of May, 1931, the car had been overhauled and inspected, and that the company had taken the precautions of burning the grass along its right of way, there were certain facts submitted to the jury upon which we think the jury had a right to base its verdict fixing the liability of the appellant, to wit, whether the employees of the company used ordinary care and diligence in the attempted extinguishment of the fire to prevent its spread or to prevent the spread of the embers from coming in contact with the dry grass adjoining the right of way, and which, being ignited, communicated with and destroyed property belonging to the appellant and resulted in his bodily injury, in an attempt which the record shows proved successful in preventing the destruction of property of some thousands of dollars in value. It was for the jury to say, in view of the fact that such a high wind, amounting to a gale, was prevailing at the time, whether a reasonable man, when he saw the embers beginning to scatter, would have immediately ceased his efforts in that direction and sought means of extinguishing the fire through the upper floor of the car. As to whether, under the conditions, the employee of the company was negligent in continuing to scatter the burning embers, under the conditions prevailing, until the grass fire was started, as we have said, was a question for the jury to determine.

[6] The record further shows that only one man of the crew of five attempted to put out the grass fire, and, he not succeeding, the train was moved on a mile and a half to a water car, where the fire in the car was extinguished, after which the train moved on some miles to Ione. After reaching Carbondale, the testimony of the conductor is that he notified a section crew, and the testimony of the foreman of the section crew is that he and his gang went down to where the fire was burning and attempted to extinguish the flames. A number of men thereafter joined and attempted to extinguish the flames, and, after it had burned over a considerable territory, the testimony shows that it was finally extinguished. The departure of the train crew from the scene of the fire without making any substantial effort to subdue the flames, the taking of the train to a station approximately a mile and a half away, and the sending back of a section crew to fight the fire, present also a question of fact for the jury as to whether the train crew was negligent in going away and leaving the plaintiff's property to the mercy of the flames. That it was a matter of economy on the part of the train crew to make sure of the safety of the train does not and did not do away with the obligation dependent upon the crew to make every reasonable effort to extinguish the conflagration.

[7] The facts which we have stated as gleaned from the record we think clearly establish that the court did not err in denying the appellant's motion for a nonsuit, and also that the verdict as to the negligence of the appellant's servants and employees is sufficiently supported.

The jury brought in a verdict of $400 actual damages, and damages in the sum of $600 on account of personal injuries suffered by Franklin Allen, the then plaintiff in this action. The total damages of $1,000 were thereafter trebled by the order of the court.

That Franklin Allen suffered damages to his property in the sum of $400 and personal injuries, as found by the jury, is not questioned; the contention being that damages for personal injuries are not allowable under the conditions here presented on the theory that one who is injured in attempting to save his property from a fire, though negligently started by another, cannot recover for such injuries; it being contended that the negligent starting of the fire is not the proximate cause of the injury. In making this contention the appellant calls our attention to a number of cases dealing only with the destruction of property, and not having before them the question of injuries to the owner of the property, suffered in an attempt to avoid its destruction by the fire. What the court may have said in those cases must be confined to the circumstances presented by the record in each case. If only the destruction of property was involved, then necessarily such cases are authority only for the law relating to the destruction of property.

[8] The statute allowing damages against one who negligently sets fire, or negligently allows it to escape, may have primarily been passed to guard against the destruction of property, yet, if the language of the statute is sufficiently broad to include injuries to person, it lays the basis for compensable damages. It may be stated here that no contention is made that Franklin Allen was negligent in exposing himself to the flames which periled his property, or that he did not act in a manner other than as a carefully prudent person would have acted under like circumstances and conditions in order to avoid further damages to his property. We do not need to cite authorities to the effect that, where one's property is in danger of being destroyed for and on account of a negligent cause instituted by another, the law requires the owner of the property to take all reasonable precautions to minimize the damages by lessening the destruction of his property.

[9] There are some decisions which hold that an action for damages on account of personal injuries cannot be recovered, but, so far as we have been able to examine such cases, they seem to more or less involve, also, the question of whether the person injured was not guilty of contributory negligence. As we have said, no issue of that kind is tendered in this action. In 51 C. J., p. 1171, we find the following: "There is a difference of opinion as to whether the negligence of a company in setting fire to property is the proximate cause of personal injuries to the owner who is burned while making an attempt to extinguish the fire and save his property. According to one line of decisions, the act of the owner in attempting to save the property, and not the negligence of the company in setting out the fire, is the proximate cause of the injury, and this is so whether or not the owner of the property is, himself, guilty of negligence. Other decisions, with perhaps better reason, hold that the negligent act of the company in setting out the fire, and not the act of the owner in attempting to save his property, is the proximate cause of the injury, and that he may recover therefor, unless he was guilty of contributory negligence." We agree with the text-writer that the better reasoning supports the holding that the negligence of the company or person setting the fire is the proximate cause of the injury in the absence of a showing of contributory negligence on the part of the injured person.

[10] While a number of cases might be cited supporting the holding that personal injuries suffered under conditions as presented here give rise to a cause of action for damages, one case only needs to be cited, to wit, Illinois Central Railroad Company v. Siler, 229 Ill. 390, 82 N. E. 362, 363, 15 L. R. A. (N. S.) 819, 11 Ann. Cas. 368. The reasoning contained in the opinion is so convincing that we quote therefrom at length as follows: "What is the proximate cause of an injury is ordinarily a question of fact, to be determined by the jury from a consideration of all the attending circumstances. Fent v. Toledo, P. & W. R. Co., 59 Ill. 349, 14 Am. Rep. 13; Pullman Palace Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; West Chicago Street R. Co. v. Feldstein, 169 Ill. 139, 48 N. E. 193. It can only arise as a question of law or pleading when the facts are not only undisputed, but are also such that there can be no difference, in the judgment of reasonable men, as to the inferences to be drawn from them. The counts all allege, substantially, that the fire was communicated to the decedent's premises by the negligence of appellant. They all allege, substantially, that while the deceased, with all due care for her safety, was trying to extinguish the fire, her clothing was ignited and her burning and death resulted. The question presented, so far as the demurrer is concerned, is whether one who has negligently set fire to another's premises can be held liable for damages caused by burning the owner while engaged in trying, with reasonable prudence and care, to extinguish such fire. Even though one's property has been negligently

set on fire by another, the owner cannot permit it to be consumed without an effort to save it and then claim reimbursement from the setter out of the fire. He must use every reasonable effort, consistent with his personal safety, to preserve the property. Toledo, P. & W. R. Co. v. Pindar, 53 Ill. 447, 5 Am. Rep. 57; Chicago & A. R. Co. v. Pennell, 94 Ill. 448. Where a person sees his property exposed to imminent danger through the negligence of another, he is justified in using every effort to save it which a reasonably prudent person would use under similar circumstances, even though the effort exposes him to some danger which he would otherwise have avoided. Due care depends upon the circumstances surrounding the action. It is to be determined with reference to the situation in which he finds himself at the time. What is due care in one situation might be gross recklessness under different circumstances. Every one is bound to anticipate the results naturally following from his acts. The appellant was therefore bound to anticipate, when the fire started, that the decedent would try to put it out. * * * In order to make a negligent act the proximate cause of an injury, it is not necessary that the particular injury and the particular manner of its occurrence could reasonably have been foreseen. City of Dixon v. Scott, 181 Ill. 116, 54 N. E. 897. If the consequences follow in unbroken sequence from the wrong to the injury without an intervening efficient cause, it is sufficient if, at the time of the negligence, the wrongdoer might, by the exercise of ordinary care, have foreseen that some injury might result from his negligence."

It is further shown in the case that the particular injuries suffered might not have been anticipated and need not to have been anticipated in order to render the one guilty of the negligent act liable. In the Siler Case a woman attempted to put out a fire to save her property, and in so doing it appears that her clothing caught fire and she was so severely burned that death ensued. The authorities supporting the holding of the court in the Siler Case are so numerous in the opinion that for the sake of brevity we can only cite the case without further quotation therefrom. We may also refer to the case of Wilson v. Northern Pacific Ry. Co., 30 N. D. 456, 153 N. W. 429, L. R. A. 1915E, 991, where the cases allowing recovery for personal injuries are set forth at great length and the rule allowing damages therefor upheld.

[11, 12] In some of the states the statutes having to do with the setting of fires read differently from the sections of the Code as they read at the time of this action. We note that the appellant states that section 3344 of the Political Code and section 3346a of the Civil Code, were in force, as hereinafter stated, at the time of this action, but that said sections are now repealed. We may state, however, that the question of whether the two sections are repealed is involved in considerable doubt. By reference to the Statutes of 1931, p. 1644, it will be observed that no mention of repealing either one of the sections is mentioned in the title of the act, which apparently brings in conflict the attempted repeal with section 24 of article 4 of the Constitution. In some of the states, also, the subject of willfulness is inserted. Nothing of that kind appears in either one of the Code sections, which read as follows:

Political Code, § 3344: "Every person negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own land, is liable in treble damages to the party injured."

Civil Code, § 3346a: "Every person negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own land, is liable in treble damages to the party injured."

By neither of these sections is the loss or damage suffered on account of the negligent act of another in starting a fire, or suffering it to spread over adjoining premises, limited to property loss. Both sections read, "damages to the party injured," excluding the idea of confining the protective provisions of the sections simply to property as against person. That property is in a sense not readily movable, and therefore more subject to fire hazards than person, affords no logical reason for drawing a distinction between the two classes of injuries, or limiting one's right to recover for only his property loss, when the real injuries inflicted may have been of a personal character. In the instant case we do not overlook the fact that Franklin Allen might have escaped personal injury by leaving his property to the mercy of the flames; on the other hand, we are mindful of the law which specifies that, even though one's property is endangered by the negligent act of another, it is the duty of the person whose property is endangered to take all reasonable measures to minimize the loss. Thus, if the owner of the 600-odd head of sheep in the instant case had abandoned them to the mercy of the flames, and instituted suit to recover for their loss, the appellant very properly could have interposed the objection that the owner should have lent his best efforts to subdue the fire and saved the lives of his sheep. We cannot subscribe to the doctrine that an injury incurred in the performance of one's duty, which duty is necessitated and enforced by the negligent act of another, is the proximate cause of an injury suffered and not the negligent act which necessitated and enforced the performance of that duty.

[13] As we read the case of Clark v. San Francisco & S. J. V. Ry. Company, 142 Cal. 614, 76 P. 507, 509, relied upon by the appellant in support of its contention that the sections of the Codes, supra, do not apply, we are forced to the conclusion that the facts in that case are so dissimilar to those presented here as to render it uncontrolling. The facts in that case were that a flaming box on one of the cars ignited grass along the highway causing the damage to the plaintiff. All that is said in the opinion relative to the sections of the Codes under consideration is as follows: "The evidence was not sufficient to show a case falling within the provisions of section 3344, Pol. Code, a section which is penal in its nature, and which must be strictly construed. Under the evidence the defendant was liable only for the actual damage." No personal element of negligence is shown to have entered into the Clark Case; no act of any individual employee of the company is shown to have started the conflagration. There is no showing in the record in that case, so far as can be ascertained from the printed opinion, that the train crew left the immediate scene of the fire without making any substantial effort to subdue the flames, took the train to a point approximately a mile and a half away, and sent back a section crew to fight the fire, mindful of the fact that a wind, admitted to be blowing at the rate of 65 to 70 miles an hour, would spread the conflagration with great rapidity. The facts of each case must be first considered before the limited language contained in any opinion of the court can be held controlling, and, where the facts are different, a different application must be made of the protective principles enunciated in the sections of the Codes, supra.

In the case of Belk v. Stewart, 160 Mo. App. 706, 142 S. W. 485, one of the cases principally relied upon by the appellant, it is evident that no thought of personal injury was in the mind of the court. That case deals only with double damages willfully inflicted or willfully caused to property by the setting out and escape of fire. We have no complaint with anything stated in that case, but we fail to perceive its applicability.

In Kennedy v. Minarets & Western Ry. Co., 90 Cal. App. 563, 266 P. 353, from the opinion of which the appellant has quoted extensively, this court went into the subject of property damages occasioned by the negligent suffering of the escape of fire, resulting in much loss and damage, a case where the employees of the respondent departed and left a smoldering fire somewhat similar to the instant case, where the employees of the company departed from the premises where the fire had been started. Again, there is nothing in the Kennedy Case which indicates that the court had in mind a limitation of the right of recovery under the sections of the Codes to mere property damages. It is true that in the Kennedy Case, and in most of the cases having to do with fires where property damage has resulted, especially in dry countries like California, the court has stressed the added peril from either the negligent setting of fires, or the negligent suffering of their spreading to adjoining premises, but in none of the cases, so far as we have been able to examine them, has there been any intimation that the words "party injured" meant only the owner of property. The mere circumstance that a given state of facts has been held to bring a case within the protective provisions of the two Code sections, supra, presents no legal reason why relief should be denied in an instance where a different state of facts exists, coming equally within the language of the sections, simply because the great majority of cases have to do with the destruction of property rather than with injury to persons. The rights to property and to protection against its destruction are certainly no greater than the right to personal security, and a "party injured" is no less a "party injured" because his body has been impaired, instead of a piece of property owned by him has been destroyed.

We do not find any reason whatever in any of the cases placing property protection upon a higher plane than personal security. Just as stated in Corpus Juris, supra, better reasoning applies the protective principle of the law to preserve both person and property.

[14] Primarily, the trebling of damages is always for the trial court.

We find no reason for disturbing the action of the court in this case.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

1 Cal.App.2d 648

BLACKBURN v. McCOY et al.

Civ. 8024.

District Court of Appeal, Second District, Division 1, California.

Oct. 30, 1934.

1. Escrows 🔑8(1)

Escrow instructions cannot create general agency, but create only limited agency of escrow holder for each depositor.

2. Escrows 🔑8(1)

Trust company, carrying out escrow instructions of woman agreeing to purchase half interest in land from holder of option to purchase it, was not obligated to inform her of price optionee agreed to pay owners, in absence of demand for such information in instructions.

3. Vendor and purchaser 🔑215

Vendors receiving money, paid to purchaser of land by one agreeing to purchase half interest therein, in payment of purchaser's obligation to vendors, *held* not bound to return money to purchaser's vendee on ground of fraud inducing latter's payment, in absence of evidence that purchaser was vendors' agent in latter transaction.

4. Accord and satisfaction 🔑23

Vendors, receiving in payment of purchaser's obligation to them money paid purchaser by another for half interest in land, *held* not bound to return money to latter on ground of fraud inducing payment to purchaser, in view of accord and satisfaction between vendors and purchaser's vendee by agreement whereby latter received option to purchase and dismissed action to rescind contract.

5. Fraud 🔑30

Real estate salesman, without knowledge of agreement between his associated salesmen and another for latter's purchase of half interest in land on basis of price for which he had informed such associates that it could be bought from holder of option to purchase it until they proposed that he join them in purchasing remaining half, *held* not liable for purchaser's loss because of such associates' fraudulent misrepresentations.

6. Fraud 🔑30

Land purchaser, from whom woman was induced to purchase half interest in land by fraudulent misrepresentations of persons contracting to purchase remaining half, *held* not liable to her for resulting loss, in absence of evidence that he was involved in conspiracy to defraud her or responsible for such misrepresentations.

7. Release 🔑29(1)

Agreement, whereby purchaser of half interest in land from holder of option to purchase it received new option from vendors and dismissed action to rescind contract for fraudulent misrepresentations by other holders of beneficial interests, which they assigned to original optionee, settled controversy as to such assignors, as well as vendors and original optionee.

8. Release 🔑29(1)

Agreement, whereby purchaser of half interest in land, from holder of option to purchase it, received new option from vendors and dismissed action to rescind purchase contract for fraud, estopped plaintiff from maintaining action against same defendants for damages.

9. Release 🔑29(1)

Release of one of several alleged joint tort-feasors releases all of them, though one released was not guilty of wrong charged.

◆

Appeal from Superior Court, City and County of Los Angeles; William Hazlett, Judge.

Action by Harriet R. Blackburn against Frank McCoy, Edward A. Henderson and others. From a judgment for defendants McCoy and others and against defendants Henderson and others, plaintiff and defendants Henderson and others appeal.

Affirmed in part, and reversed in part.

Newby & Newby, of Los Angeles (Dee Holder, of Los Angeles, of counsel), for appellant Blackburn.

Halverson & Halverson, of Los Angeles, for defendants and appellants Henderson, Gilgen, Arends, and Marte.

Warren L. Williams and Seymour S. Silverton, both of Los Angeles, for respondents McCoy.

Hyams & Himrod, of Los Angeles, for respondent Title Guarantee & Trust Co.

HAHN, Justice pro tem.

The action, which gives rise to the appeals which are before us, is one wherein the plaintiff brought suit to recover damages for the sum of $36,251.37, alleged to have been suffered by her by reason of losses sustained in a real estate transaction, in which she alleges she was induced to invest her money through fraudulent representations made to her by the defendants.

Plaintiff had judgment against the defendants Edward A. Henderson, Lawrence C. Gilgen, Edward Arends, and Walter Marte for the sum of $36,251.37, while judgment went for the defendants Frank McCoy, Florence McCoy, and the Title Guarantee & Trust Company.

Plaintiff appeals from that part of the judgment which is in favor of Frank McCoy, Florence McCoy, and the Title Guarantee & Trust Company, while defendants Edward A. Henderson, Lawrence C. Gilgen, Edward Arends, and Walter Marte appeal from the judgment rendered against them.

From the evidence it appears that on August 25, 1926, defendants Frank McCoy and Florence McCoy, his wife (who will hereafter be referred to as the McCoys), being the owners of a tract of land of about fifteen acres, gave to defendant Henderson a written option for the purchase of the land for the sum of $146,250. Shortly thereafter Henderson informed Marte that he had this option and that the property could be bought for $174,000 with a cash payment of $52,500. Marte advised Gilgen and Arends, who were associated with him as salesmen for a large real estate brokerage concern, that the property could be bought, and expressed to them his opinion that it was a chance to make some money. Without Marte's knowledge, Gilgen and Arends contacted Mrs. Blackburn, who, after a number of interviews with them, agreed to purchase a one half interest in the property on the basis of the price of $174.000, if they would secure purchasers for the other half. When Marte was advised by Gilgen that he had this proposal from Mrs. Blackburn, he agreed with Arends and Gilgen that they propose to Henderson a purchase by their group, including Mrs. Blackburn, of seven-eighths interest in the land with a cash payment of $25,000. This proposal contemplated that Marte, Gilgen, and Arends would each take a one-eighth interest, without making any cash payment therefor. Henderson, before agreeing to accept this proposal, secured from the McCoys an agreement to accept $25,000 as a cash payment instead of $52,250 as provided in his option, and his note for $121,250 for the balance of the purchase price. Thereupon Henderson entered into an agreement to sell to Marte, Gilgen, and Arends, and their associate whose name was not given to Henderson, a seven-eighths interest in the land for $152,250 with a cash payment of $25,000 and the notes of the buyers for the balance of the purchase price.

On October 20, 1926, Henderson and the McCoys executed an escrow agreement with defendant Title Guarantee & Trust Company, providing for the purchase by Henderson of the property for $146,250, which purchase price he agreed to pay $25,000 cash and the balance by his promissory note for $121,250 to be secured by a trust deed on the property. Neither the McCoys nor the escrow agent were informed at that time that any other person was or would be interested in the transaction. Some time prior to January 5, 1927, the trust company was informed by Henderson that there would be others interested in the property and that the form of the transaction would be changed so that title to the property would vest in the trust company and a declaration of trust created, in which the several parties interested in the property would have their shares represented by certificates of beneficial interest.

On January 5, 1927, Mrs. Blackburn, accompanied by Gilgen, went to the office of the trust company and there executed her escrow instructions providing for the purchase by her of a one-half interest in the declaration of trust for $87,000 to be paid $26,250 in cash and $60,750 by her promissory note made payable to Henderson. On the same day Gilgen, Arends and Marte gave their instructions and executed and delivered into escrow their respective notes made payable to Henderson for their shares. On January 25, 1927, the transaction was closed. The McCoys received $25,000 in cash, less some charges, which was the cash payment Henderson agreed to pay under his escrow agreement with them, and Henderson's note for $121,250. Henderson in turn received the notes of Blackburn, Gilgen, Arends, and Marte, together with their certificates of beneficial interest in the trust as security for the payment of their respective notes. Prior to January 25, 1927, Henderson had never met Mrs. Blackburn.

After some six months of fruitless effort on the part of Gilgen, Arends, and Marte to sell the property, on August 21, 1927, Mrs. Blackburn served a notice of rescission on all the parties named as defendants in this action and followed this with the filing of a suit for rescission of her contract, charging fraud and deceit as against all of the parties defendant. The complaint in that action, which for the purpose of brevity will be referred to as the first action, contains substantially the same matters set forth in the complaint filed in this action; the only difference being as to the prayer for relief. The notice of rescission served on the McCoys on August 21, 1927, was the first intimation that they had that Mrs. Blackburn was in any way interested in the property. All of the parties defendant filed answers and the action was set for trial in June, 1928. Shortly before the date set for trial of this first action, Mrs. Blackburn's counsel requested of counsel for the McCoys that a conference be had with the view of attempting a settlement of the controversy. Pursuant to this request, a meeting was had between the McCoys and their attorney, and Mrs. Blackburn and her attorney, at which conference it was agreed upon between them, that inasmuch as there had been a default in the interest on Henderson's note to McCoys, they would take steps to clear the title to the property, and when this was accomplished, they would give to Mrs. Blackburn a six months' option to purchase the property at the original option price of $146,250 given to Henderson; that in the event that Mrs. Blackburn exercised the option, the McCoys would credit upon the purchase price the amount which she had paid on account of the purchase by her of a one-half interest in the property from Henderson. In turn Mrs. Blackburn agreed to dismiss the first action.

McCoys informed Henderson of their tentative agreement with Mrs. Blackburn and proposed that to save a lawsuit to terminate their agreement with him, he arrange for an assignment of all the beneficial interests in the declaration of trust to them, in which event they (the McCoys) would cancel and deliver to him his promissory note for $121,250. Also, that in consideration of the new option which the McCoys would then give to Mrs. Blackburn, she would dismiss the pending action. Henderson explained the proposal to Gilgen, Marte and Arends, who upon the understanding that in this new arrangement they would get their respective notes back from Henderson and the controversy which formed the basis for Mrs. Blackburn's suit would be settled, consented to the proposal and assigned to Henderson their respective beneficial interests in the trust. Mrs. Blackburn also assigned to Henderson her beneficial interest and received from Henderson her note to him for $60,750. Thereupon Henderson turned over to the McCoys all of the beneficial interests in the declaration of trust and received back from the McCoys his note for $121,250. Mrs. Blackburn dismissed her action and received from the McCoys a six months' option as had been agreed between them. Failing to negotiate a sale for the property within the life of the option Mrs. Blackburn five days before its expiration filed the present action for damages, naming, with the exception of one Thomas S. Clark, the same persons as defendants as she named in her first action which had been dismissed.

In view of the conclusions arrived at on the points raised on appeal, we do not deem it necessary to recite in detail either the allegations of fraud and deceit as set forth in the complaint, or the evidence from the voluminous transcript bearing upon these allegations.

In support of her appeal from the judgment in favor of the Title Guarantee & Trust Company, appellant Blackburn urges that the trust company as escrow holder was her agent, and therefore bound to advise her that the Henderson option from the McCoys provided for a purchase price of $146,250, instead of a price of $174,000, which was the basis of her purchase; that if the trust company had given her that information she would not have entered into a transaction for the purchase on the basis of $174,000; that by reason of its failure to so inform her, the trust company is liable in damages for the amount of the loss she sustained in her venture with Henderson and his associates.

[1] There seems to be a divergence of opinion in the books as to whether the status of an escrow holder is that of an agent or trustee for the parties to the escrow. Conceding that the escrow instructions created an agency in the defendant Title Guarantee & Trust Company for the several parties to the escrow, as contended for by appellant Blackburn, it could not be a general agency for each one of the parties because their interests were conflicting. The status could only properly be classified as an agency on the theory that there was a limited agency as to each party to the escrow, whereby the duties and obligations owing by the escrow holder to each would not conflict with the duties it owed to the others. The usual purpose that prompts the creation of an escrow is the desire of persons dealing at arm's length with each other to have their conflicting interests handled by one person in such a manner as to adequately protect the rights of each of the parties to the transaction. The fundamental principles underlying the obligations of a general agency would not, and could not, tolerate the operation of an escrow, such as we have here, as a general agency. If the several escrow instructions create in the escrow holder an agency, it must be one limiting the obligations of the escrow holder to each party to the escrow in accordance with the instructions given by such party. This in practice has been and is the underlying principle

that has made possible the development of the escrow method of handling transactions which has become such an important factor in conveyancing and other business activities. Upon this theory, it has been given almost universal judicial sanction in this and other jurisdictions. This theory of limited agency finds support in the following cases: Nelson v. Ashton-Jenkins Co., 66 Utah, 351, 242 P. 408; Bailey v. Security Trust Co., 179 Cal. 540, 177 P. 444; Thornhill v. Olson, 31 N. D. 81, 153 N. W. 442, L. R. A. 1916A, 493, Ann. Cas. 1917E, 427; Smith v. Griffith, 105 Kan. 357, 184 P. 725; Feisthamel v. Campbell, 55 Cal. App. 774, 205 P. 25; Seibel v. Higham, 216 Mo. 121, 115 S. W. 987, 129 Am. St. Rep. 502.

[2] It is not claimed by appellant Blackburn that the defendant failed in any respect to carry out the specific instructions given in her escrow instructions. These instructions constituted the full measure of the obligations which the trust company assumed to perform and therefore owed to her. Mrs. Blackburn did not include in her instructions any demand to be informed as to the price Henderson was paying the McCoys for the property under his agreement with them. Hence the escrow holder was under no obligation to give Mrs. Blackburn this information, and not failing in the performance of any obligation it owed Mrs. Blackburn, defendant Title Guarantee & Trust Company is not liable to her for any loss she suffered in her transaction involving the purchase of the property from Henderson.

In none of the cases cited by appellant Blackburn in her appeal against defendant Title Guarantee & Trust Company do we find any views expressed in conflict with the views we have here indicated. We therefore conclude that her appeal from the judgment in favor of defendant Title Guarantee & Trust Company must be denied.

[3] Nor is there merit in appellant Blackburn's appeal from the judgment in favor of the defendants McCoy. It is urged in support of this appeal that, because the money received by the McCoys from Henderson in payment of his obligation to them was money that had been paid by appellant Blackburn under her contract with Henderson, the McCoys were bound to return this money to her for the reason that she had been induced through fraud and deceit to pay it to Henderson.

In support of this contention, appellant Blackburn cites the rule that "the principal who accepts the benefits of the transaction negotiated by his agent adopts with such benefits the loss taken to procure them." The weakness of this argument arises from the fact that there is nothing in the evidence to support a finding that Henderson was the agent of the McCoys in the transaction wherein appellant Blackburn purchased a one-half interest in the property. The McCoys were in no legal sense parties to the contract between Henderson as seller and Blackburn et al., as buyers, in which transaction Mrs. Blackburn paid to Henderson the $25,000 which he used to pay his obligation to them. Nor did they have any knowledge of either the source from whence it came, or the representations that induced Mrs. Blackburn to deposit it in escrow. Under these circumstances it cannot be said that when it came into the hands of the McCoys there was attached to it any taint of fraud that required them in good conscience to pay it over to Mrs. Blackburn.

[4] A second answer to appellant Blackburn's claim against the McCoys is found in the fact that there was as between them an accord and satisfaction as to the matters set forth in the complaint in the first action by reason of the agreement whereby the McCoys gave to Mrs. Blackburn a new option and appellant Blackburn dismissed her rescission action. This point will be discussed further in considering defendants' appeal.

[5] As to the appeals of defendants Henderson, Marte, Gilgen, and Arends, it is contended in their behalf: First, that the evidence does not support the court's finding that Henderson and Marte, or either of them conspired with Gilgen and Arends to defraud plaintiff by causing Gilgen and Arends to make fraudulent and untruthful representations to her in order to induce her to purchase the one-half interest in the property. This contention has merit. There is no competent evidence in the record that will support a finding that either Gilgen or Arends in their dealings with Mrs. Blackburn was the agent of Marte, or that Marte had at that time any interest in the deal they were working on. Not until they came to him with the proposal that he join them as purchasers did he know of the plan which had been agreed to between Mrs. Blackburn and Gilgen and Arends for the purchase of the property. At that time all of the alleged misrepresentations that induced Mrs. Blackburn to make her purchase had been made to her by Gilgen and Arends. We are unable under the undisputed facts in the record to determine that upon any legal basis Marte can be held liable for the fraud

and deceit practiced by Gilgen and Arends on Mrs. Blackburn.

[6] Nor does the evidence justify the court's findings that Henderson was involved in a conspiracy to defraud Mrs. Blackburn or that he was responsible for any of the misrepresentations made to her by Gilgen and Arends. Gilgen and Arends were not the agents of Henderson. Henderson as seller was dealing at arm's length with Gilgen, Arends, and Marte as buyers. It does not appear that Henderson had any knowledge that Mrs. Blackburn was being contacted by Gilgen and Arends as a prospective buyer of the property, nor did he know she was a purchaser until after she put her money and instructions in escrow. It does not appear that at any time he directed or encouraged Gilgen and Arends or either of them to make any representations to Mrs. Blackburn about the property. Under this state of facts, Henderson cannot be held responsible for the fraud and deceit of Gilgen and Arends.

As to the appealing defendants' second point, that the evidence fails to support any of the court's findings as to fraud practiced and misrepresentations made by any of them, we cannot give assent to this contention. Without reciting in detail the evidence in the record bearing upon this point, we deem it sufficient to meet the requirements of this opinion to say that there is sufficient evidence in the record to support the court's findings of fraud and deceit practiced upon Mrs. Blackburn by defendants Gilgen and Arends and which induced her to invest her money in the deal.

[7] The last point urged by defendant appellants, which we feel requires our consideration, is that plaintiff-appellant waived her right of action against all of the defendants by the consummation of the agreement between her and the McCoys, whereby she, in consideration of the dismissal of her first action, received from the McCoys the six months' option to purchase the property at the original option price to Henderson. This contention is based upon two considerations which find support in the books: First, that the agreement whereby Mrs. Blackburn received the six months' option and dismissed her first action, constituted a settlement of the controversy upon which the action was predicated as to all of the named defendants; and, second, that by reason of the fact as found by the court that the agreement between the McCoys and Blackburn constituted a settlement between them as to any claim Mrs. Blackburn might have had against the McCoys arising out of "the matters and things in this action," under the well-established rule that a settlement by one joint tortfeasor with the claimant releases such tortfeasors, Mrs. Blackburn is estopped from maintaining the action against any of the defendants.

In support of the first consideration urged, appellants cite the case of Schmidt v. Mesmer, 116 Cal. 267, 48 P. 54, 56, wherein is quoted with approval from the opinion in St. John v. Hendrickson, 81 Ind. 350, the following statement of the law which we deem pertinent to the facts in this case: "We do hold that where a party, with full knowledge of all the material facts, does an act which indicates his intention to stand to the contract and waive all right of action for fraud, he cannot maintain an action for the original wrong. * * * Where the affirmance of the contract is equivalent to a ratification, all right of action is gone. * * * Nor are we unmindful of the settled rule that the defrauded party has an election of remedies. * * * We do decide that where a party with full knowledge declines to repudiate a transaction known to him to be fraudulent, and fully and expressly ratifies it, he can neither rescind, nor maintain an action for damages." The principle has been accorded recognition in the following cases: Ball v. Warner, 80 Cal. App. 427, 251 P. 929; Edwards v. Roberts, 7 Smedes & M. 544 (Miss.); Negley v. Lindsay, 67 Pa. 217, 5 Am. Rep. 427; Nounnan v. Sutter County Land Co., 81 Cal. 1, 22 P. 515, 6 L. R. A. 219.

The undisputed facts bearing upon the negotiations and the agreement resulting therefrom, whereby Mrs. Blackburn secured a new option from the McCoys and the return from Henderson of her note for $60,750 in consideration for which she dismissed her first suit, justifies but one reasonable conclusion, and that is that it was the intention of Mrs. Blackburn and the belief of all of the other parties in co-operating so as to make possible an early fulfillment of the agreement, that the new arrangement would terminate the controversy and litigation that had as its basis the alleged false representations which induced Mrs. Blackburn to invest her money in the property. That Mrs. Blackburn did not succeed in selling the property during the life of the option in no way militates against the legal effect of the agreement by which she obtained the option and her note. As to defendants McCoy and Henderson, with whom Mrs. Blackburn dealt directly in the consummation of the agreement, it would seem that the rule above stated is clearly applicable. As to the other defendants, there being no direct negotiations or agreement between them and Mrs. Blackburn, that they are entitled to the benefit of this rule is not free from doubt. It seems incredible that Mrs. Blackburn in her negotiations with the McCoys and Henderson did not know that the other holders of beneficial interests were being contacted for the purpose of inducing them to assign their interests to Henderson, in order that her agreement with the McCoys might thus be consummated.

[8, 9] Whatever of weakness there may be in the argument that the above-quoted rule is applicable as a defense for Gilgen, Marte, and Arends, the second consideration urged under this point would seem to be a complete answer to plaintiff's right to maintain this action against them. The rule that the release of one joint tort-feasor operates in law to release all of the joint tort-feasors from the claim of the injured party is well established in California. Tompkins v. Clay Street R. Co., 66 Cal. 163, 4 P. 1165; Adams v. Southern Pacific Co., 204 Cal. 63, 266 P. 541, 57 A. L. R. 1066; Hawber v. Raley, 92 Cal. App. 701, 268 P. 943; Chetwood v. California National Bank, 113 Cal. 414, 45 P. 704.

Inasmuch as the opinions in the cases cited contain an extended discussion of the considerations which are held to justify the rule, we do not feel it will serve any useful purpose to extend this opinion with a repetition of such discussion. In making this application of the rule to the appealing defendants, we are not unmindful of the fact that the trial court held, and properly so, that the McCoys were not in any way responsible for the fraud and deceit practiced upon Mrs. Blackburn. Under the rule as established in California, the fact that the one released may not be guilty of the wrong charged does not affect the operation of the rule.

In view of our conclusions upon the points described we do not deem it necessary to give consideration to other points raised in the briefs filed, as our views upon these points would not affect the conclusion arrived at.

The judgment in favor of defendant Title Guarantee & Trust Company and Frank McCoy and Florence McCoy is affirmed. The judgment in favor of plaintiff Harriet R. Blackburn and against Edward A. Henderson, Lawrence C. Gilgen, Edward Arends, and Walter Marte is reversed.

We concur: CONREY, P. J.; HOUSER, J.

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1 Cal.App.2d 727

PEOPLE v. MURIETA.

Cr. 2573.

District Court of Appeal, Second District, Division 1, California.

Nov. 2, 1934.

Criminal law ⚷1159(3)

Conviction on conflicting evidence cannot be disturbed.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Armand Murieta was convicted of robbery, and of kidnapping, and he appeals.

Affirmed.

J. Harvey Hearn, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

HOUSER, Justice.

Defendant was convicted on each of three counts of robbery and on each of three counts of kidnaping. He appeals from the ensuing judgment, as well as from the order by which his motion for a new trial was denied.

In his brief appellant states the point upon which he relies for a reversal of the judgment as follows: "The appeal herein is based solely upon the [in]sufficiency of the evidence to justify the verdicts. It is submitted that each of the verdicts rendered is against the evidence and the weight of evidence."

However, an examination of his brief discloses the fact that, specifically, appellant contends not that the evidence adduced by the prosecution was actually insufficient, but rather that the evidence presented by defendant with relation to an "alibi" was so strong and persuasive that it should have overcome the evidence upon which the prosecution relied for the conviction of defendant. But the law appears to be well established that such a situation presents a problem that is to be solved primarily by the trial jury; which solution, in case of a conviction of the defendant, the trial judge, unless he grant a new trial, must impliedly approve and affirm. In such circumstances, however firmly convinced an appellate court may be of the honesty, integrity, and the truthfulness of the several witnesses by whose testimony the defendant has unsuccessfully attempted to establish his "alibi," such tribunal is powerless to over-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

throw an adverse verdict and an ensuing judgment. Abstractly and concretely, the cases are legion which so decide. The citation of some of them in this state will suffice: People v. Fice, 97 Cal. 459, 32 P. 531; People v. Sears, 119 Cal. 267, 51 P. 325; People v. Mendez, 193 Cal. 39, 223 P. 65; People v. Boero, 13 Cal. App. 686, 110 P. 525; People v. Hoosier, 24 Cal. App. 746, 142 P. 514; People v. Carnes, 49 Cal. App. 225, 192 P. 1088; People v. Jo Fong, 59 Cal. App. 259, 210 P. 548; People v. Ybarra, 68 Cal. App. 259, 228 P. 868; People v. Booth, 72 Cal. App. 160, 236 P. 987; People v. Egan, 77 Cal. App. 279, 246 P. 337; People v. Lawler, 79 Cal. App. 207, 249 P. 18; People v. Casey, 79 Cal. App. 295, 249 P. 525; People v. North, 81 Cal. App. 113, 252 P. 1063; People v. Giacobbi, 83 Cal. App. 12, 256 P. 299; People v. Ferlito, 100 Cal. App. 355, 280 P. 136; People v. Yeoman, 115 Cal. App. 518, 1 P.(2d) 993; People v. McClain, 115 Cal. App. 505, 1 P.(2d) 1085; People v. Robertson, 117 Cal. App. 413, 3 P.(2d) 946; People v. Myers, 122 Cal. App. 675, 10 P.(2d) 498.

It is ordered that the judgment and the order by which defendant was denied a new trial be, and they are, affirmed.

We concur: CONREY, P. J.; YORK, J.

* * *

1 Cal.App.2d 634

LOS ANGELES BOND & SECURITIES CO. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 9897.

District Court of Appeal, Second District, Division 2, California.
Oct. 29, 1934.

1. Certiorari ⇨7

Judgment of inferior court will not be reviewed on certiorari after appeal is taken therefrom and determination of appeal in superior court.

2. Certiorari ⇨64(1)

Irregularities or errors of small claims court cannot be examined in reviewing proceedings in superior court on appeal from small claims court, since writ of certiorari, being directed to review of superior court proceedings, is limited to such acts of that court as were in excess of its jurisdiction.

3. Certiorari ⇨64(1)

Where superior court has statutory jurisdiction of appeals from small claims court with power to hear and determine case on trial de novo, its judgment, within limits of jurisdiction, is "final judgment," not in excess of jurisdiction, notwithstanding its conclusions may be wrong and neither errors within such jurisdiction, nor sufficiency of evidence to support judgment are reviewable on certiorari (Code Civ. Proc. § 927j).

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

4. Certiorari ⇨64(2)

Review of evidence may be had on certiorari where question is whether jurisdictional facts have been proved except where tribunal is vested with jurisdiction to try and determine a fact in issue with reference to proof of that fact, since in such case that fact is not the jurisdictional fact and the determination of the court thereon is not void, however defective the evidence on which it is based.

5. Certiorari ⇨28(2)

Small claims and superior courts had jurisdiction of plaintiff's demand for money paid defendant under misrepresentation of facts under settlement agreement precluding review by certiorari of superior court's judgment as against contention that superior and small claims courts had no jurisdiction because no debt for money had and received had come into existence, in that plaintiff had not rescinded agreement, since under circumstances no rescission was necessary but demand for return of money wrongfully paid was sufficient (Code Civ. Proc. §§ 927b, 927j).

6. Money received ⇨11

Where there was error in charge of attorney's fee and fee for title search as part of agreed adjustment of action involving foreclosure of street bond lien, rescission of entire adjustment agreement *held* not necessary to maintenance of action for money had and received where plaintiff had complied with statutes, governing such actions, requiring only demand for money wrongfully paid and received (Code Civ. Proc. §§ 927b, 927j).

7. Money received ⇨1

Essence of claim for money had and received is possession of money by defendant, which in equity and good conscience ought to be restored to plaintiff.

Certiorari by the Los Angeles Bond & Securities Company against the Superior Court of the State of California in and for the County of Los Angeles, to annul a judgment entered after trial de novo of a case appealed from the small claims court sitting in the city of Los Angeles.

Writ discharged.

John C. Gillham, of Los Angeles, for petitioner.

Marshall Stimson, of Los Angeles, for respondent.

WILLIS, Justice pro tem.

By this proceeding in certiorari petitioner seeks to annul a judgment of the superior court entered after trial de novo of a case appealed from the small claims court sitting in the city of Los Angeles.

One Anna May Brown filed an affidavit in the small claims court substantially in the form required by section 927b of the Code of Civil Procedure, claiming that petitioner herein was indebted to her in the sum of $37 for money had and received. Trial was duly had thereon and judgment was entered in favor of Mrs. Brown for the sum of $30. Within five days thereafter petitioner appealed to the superior court from such judgment, in accordance with the provisions of section 927j of the Code of Civil Procedure. Thereafter trial de novo was duly had in the superior court and therein a judgment was entered in favor of Mrs. Brown and against petitioner for said sum and costs in the further sum of $7.60. This judgment petitioner now seeks to have annulled on the ground that the small claims court did not have jurisdiction of the subject-matter of the cause, and that by reason of said court acting in excess of its jurisdiction the superior court on the appeal also acted without and in excess of its jurisdiction.

It is patent that the affidavit filed in the small claims court effectually invoked the jurisdiction of that court in respect to the subject-matter therein, but it is contended that during the trial facts were presented in evidence which deprived the court of such jurisdiction. Briefly stated, petitioner's contention is that the $30 awarded by the judgment in that court comprised two items of a list of items going to make up a total which had been previously agreed upon between the parties as the amount which petitioner would accept in consideration of a dismissal of an action in the superior court between the parties, wherein petitioner was seeking to foreclose a street bond lien on Mrs. Brown's real property and a reinstatement of her bond; that petitioner had accepted such total amount and had dismissed such action and reinstated the bond; and that Mrs. Brown had never rescinded that agreement and therefore no cause of action for money had and received existed, and no jurisdiction was vested in the small claims court to adjudge rescission and repayment. The items in question were $25 for attorney's fee and $5 for title search, represented by petitioner to Mrs. Brown as having been incurred but which in truth had not been incurred. The record certified up and before us shows that the evidence given in each court reveals the facts substantially as stated above.

[1-3] It is a settled rule in this state that the judgment of an inferior court will not be reviewed on certiorari after appeal taken therefrom and determination of such appeal in the superior court. Roberts v. Police Court, 185 Cal. 65, 195 P. 1053. The writ herein is directed to a review of the action of the superior court; its functions are limited to such acts of that court as were in excess of its jurisdiction and no irregularities or errors of the small claims court may be examined on this proceeding. Sherer v. Superior Court, 94 Cal. 354, 29 P. 716; Roberts v. Police Court, supra. Petitioner invoked the jurisdiction of the superior court by taking the appeal, thereby wiping out the judgment in the small claims court; and the statutes gave to the superior court jurisdiction to entertain such appeal, with power to hear and determine the case on a trial de novo. The mere fact that its conclusion may be wrong does not make its action in excess of its jurisdiction. Roberts v. Police Court, supra; Erickson v. Municipal Court, 219 Cal. 737, 29 P.(2d) 192. Having acquired jurisdiction by virtue of the appeal, its judgment within the limits of that jurisdiction was a final judgment, and neither errors within such jurisdiction, however glaring or gross they may be, nor the sufficiency of the evidence to support such judgment can, as a general rule, be reviewed on certiorari. Sherer v. Superior Court, supra; Fleming v. Superior Court, 196 Cal. 344, 238 P. 88; Sears v. Superior Court, 133 Cal. App. 704, 24 P.(2d) 842; Brune v. Superior Court, 113 Cal. App. 21, 297 P. 566.

[4] To the general rule that the sufficiency of the evidence to support the judgment of the trial court will not be reviewed on certiorari there is, however, an exception which permits the review of the evidence given in the court below when the question is whether jurisdictional facts were or were not proved. Garvin v. Chambers, 195 Cal. 212, 232 P. 696; Roberts v. Police Court, supra. But this exception has no application whatever to a tribunal, invested with jurisdiction to try

and determine a fact in issue, with reference to proof of that fact. In such a case that fact is not what is called a "jurisdictional fact." It is the fact to be determined by the court having jurisdiction to determine it; and the determination of the court thereon is not void, however defective the evidence (where there is any substantial evidence) upon which it is based. Roberts v. Police Court, supra.

[5-7] The fact in issue in both the small claims court and the superior court was whether petitioner owed money to Mrs. Brown. The complaint filed in the small claims court clearly stated a proper case within that court's jurisdiction. By the appeal the superior court acquired a like jurisdiction, and at the trial in the latter court evidence was adduced from which the court decided that petitioner owed Mrs. Brown $30, paid by her to petitioner under misrepresentation of facts on the settlement of the bond account. It is contended by petitioner that the undisputed evidence and the facts as found by the court below showed that the debt for money had and received had not come into existence, because Mrs. Brown had never rescinded the agreement in question, and therefore no jurisdiction existed in either court to render the judgment sought to be annulled. We are satisfied that the agreement was not a compromise agreement, as claimed by petitioner, but was an agreed adjustment of an account for charges accrued on a street bond up to the time of such statement, on payment of which petitioner agreed to dismiss its foreclosure proceedings and reinstate the bond. This was accomplished, but later Mrs. Brown discovered that the two items comprising the $30 were wrongfully exacted from her—that they were fictitious charges, return of which she demanded and on refusal so to do she commenced her action. We think this case falls within the principle that where, after a settlement and adjustment of an account of the dealings between parties, a mistake or misrepresentation as to an item is discovered, to recover which an action is brought, the commencement of such an action does not entitle the defendant to open the entire account but the error may be corrected and the rights of the parties readjusted in that respect. Ballard v. Beveridge, 171 N. Y. 194, 63 N. E. 960, and cases therein cited. In accordance with that principle and upon reason, in this case no rescission under the terms of the Code of Civil Procedure sections was necessary, a demand for the return of the money thus wrongfully paid and received being sufficient. The money so paid was money in the hands of petitioner which of right belonged to Mrs. Brown and which in equity and good conscience petitioner ought to restore to her. This is the essence of the legal claim of money had and received. On that claim the judgment herein is predicated, and the evidence before us shows no excess of jurisdiction in the proceedings in the superior court.

The writ is discharged.

We concur: STEPHENS, P. J.; DESMOND, J.

1 Cal.App.2d 722

MACFARLANE v. FAULKNER et al.

Civ. 8073.

District Court of Appeal, Second District,
Division 1, California.
Nov. 1, 1934.

1. Appeal and error 🔑907(3)

Where record on appeal is presented solely on clerk's transcript, all findings of fact would be deemed to have been fully supported by evidence.

2. Subrogation 🔑26

Where abstractor who issued certificate of title in which it was erroneously shown certain property was free from mortgages subsequently paid mortgage on property, abstractor was "volunteer" and not entitled to recover payments made from original mortgagors, in absence of assignment of rights of purchasers for whom abstract was made, since no privity of contract existed between abstractor and original mortgagors, particularly where original mortgagors had notified abstractor they were not liable on mortgage.

[Ed. Note.—For other definitions of "Volunteer," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by C. I. Macfarlane, doing business under the name and style of the Inyo County Abstract Company, against Robert Faulkner and Margaret Faulkner, also known as Maggie Faulkner. From a judgment for the defendants, the plaintiff appeals.

Affirmed.

Bordwell, Mathews & Wadsworth and John H. Mathews, all of Los Angeles, for appellant.

Jesse E. Jacobson and August J. O'Connor, both of Los Angeles, for respondents.

HOUSER, Justice.

Plaintiff, Macfarlane, doing business as Inyo County Abstract Company, issued a certificate of title by which it was shown that certain real property sold by defendants to the city of Los Angeles was free and clear of all incumbrances; when, as a matter of fact, the county records showed an unsatisfied mortgage recorded against said real property that theretofore had been executed by defendants. The original mortgagees demanded payment of the note from the city of Los Angeles. Thereupon plaintiff demanded that the defendants, as the original makers of the note, pay the same, which defendants refused to do. At the same time, defendants notified plaintiff that they were not obligated on said note. Whereupon, without then or ever obtaining an assignment to him of the rights of the city of Los Angeles in the matter, plaintiff paid the principal and accrued interest provided for in the note. This action was then brought by plaintiff to recover from the defendants the amount so paid.

On the trial of the action, judgment was rendered in favor of defendants; from which judgment plaintiff has appealed to this court. The record on appeal is presented solely on the clerk's transcript, which contains nothing other than the complaint, the answer, the findings of fact and conclusions of law, the judgment, the notice of appeal, and the necessary official and other certificates of verity, etc. In other words, no bill of exceptions is presented; nor has any reporter's transcript of the evidence received on the trial been filed herein; nor, indeed, does the brief of appellant purport to contain any specification of errors asserted to have been committed by the trial court in the conduct of the trial, or otherwise. In his "argument," appellant submits "that there is but one point presented on this appeal, namely, is the plaintiff, under the circumstances of this case, entitled in equity or otherwise to judgment against the defendants for the amount that plaintiff paid in order to clear off a mortgage against certain real property sold by defendants to the city of Los Angeles. * * *"

[1] In the existing circumstances, all findings of fact made by the trial court must be deemed to have been fully supported by the evidence; and it becomes evident that, if such findings of fact support the judgment, the order of this court must be an affirmance thereof. In that connection, the pertinent and essential findings by the trial court are: "That it is true that plaintiff, prior to said payment, demanded the defendants to discharge said note and mortgage; that defendants refused so to do; that defendants notified plaintiff, prior to said payment, that defendants were not obligated on said note."

And among the "conclusions of law" are certain other facts which may be regarded as mixed findings of law and fact, to wit:

"That plaintiff was negligent in searching the records of Mono county, California, and in certifying title to be vested in the city of Los Angeles free and clear of all encumbrances. * * *

"That there was no contractual relationship between the plaintiff and defendants either express or implied; that plaintiff paid said note and discharged said mortgage without the knowledge or consent, and against the will, of the defendants."

[2] It therefore appears that in paying the amount due on the note plaintiff was but a volunteer, protecting the city of Los Angeles against an existing mortgage on property, which incumbrance, through his own error and negligence, plaintiff had certified was nonexistent. Especially in the absence of an assignment made of the rights (if any), which the city of Los Angeles had as against the defendants, no privity of contract existed as between plaintiff and defendants. Moreover, in the face of the "notification" by defendants to plaintiff "prior to said payment, that defendants were not liable on said note," and that "plaintiff paid said note and discharged said mortgage without the knowledge or consent, and against the will, of the defendants," no justification, either in law or in equity, is apparent on the side of the plaintiff. For aught that appears from the record herein (other than lack of consideration for the note), defendants may have had a complete defense to any action that might have been brought against them on account of said note and mortgage.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

1 Cal.App.2d 523

UNIVERSITY OF SOUTHERN CALIFORNIA v. ROBBINS.

Civ. 9434.

District Court of Appeal, Second District, Division 2, California.

Oct. 22, 1934.

Hearing Denied by Supreme Court Dec. 20, 1934.

1. Eminent domain 🔑1

State Legislature has unlimited power of eminent domain, subject to restrictions that use must be public and proper compensation must be paid to owner, determination of which in individual case are judicial questions (Code Civ. Proc. § 1237; Const. U. S. Amend. 14).

2. Eminent domain 🔑13

Power to determine what uses are public is vested in Legislature (Code Civ. Proc. § 1237; Const. U. S. Amend. 14).

3. Eminent domain 🔑13

"Public use" means use by public, and, to make use public, duty must devolve on person or corporation holding property appropriated by right of eminent domain to furnish public with use intended, and public must be entitled as of right to use or enjoy property taken (Code Civ. Proc. § 1237; Const. U. S. Amend. 14).

What is "public use" frequently and largely depends upon facts and circumstances surrounding particular subject-matter in regard to which character of use is questioned, and it is not essential that entire community, or even any considerable portion thereof, should directly enjoy or participate in improvement in order to constitute "public use."

[Ed. Note.—For other definitions of "Public Use (in Eminent Domain)," see Words & Phrases.]

4. Eminent domain 🔑10(1)

University organized as benevolent nonprofit corporation open to all residents of state possessing required educational qualifications *held* proper recipient of power of eminent domain, in view of constitutional injunction regarding legislative encouragement of education (Code Civ. Proc. §§ 1237, 1238; Const. art. 9, § 1, and art. 13, § 1a; Const. U. S. Amend. 14).

5. Eminent domain 🔑10(1)

University organized as benevolent nonprofit corporation and open to all residents of state possessing required educational qualifications *held* entitled to power of eminent domain notwithstanding possibility that its articles of incorporation might be amended or arbitrary ruling adopted so as to infringe rights which public may now enjoy (Code Civ. Proc. §§ 1237, 1238; Const. art. 9, § 1, and art. 13, § 1a; Const. U. S. Amend. 14).

6. Eminent domain 🔑10(1)

University organized as benevolent nonprofit corporation open to all residents of state possessing required educational qualifications *held* entitled to power of eminent domain notwithstanding its reservation of right to reject applicants otherwise meeting requirements for admission because of inimical moral and ethical purposes (Code Civ. Proc. §§ 1237, 1238; Const. art. 9, § 1, and art. 13, § 1a; Const. U. S. Amend. 14).

7. Eminent domain 🔑10(1)

University requiring for regular admission completion of four-year high school course or equivalent *held* entitled to exercise power of eminent domain as against contention it was not entitled to tax exemption as educational institution of collegiate grade, because certain special students were permitted to take courses without compliance with such requirements (Pol. Code, § 3613, subd. 2; Code Civ. Proc. § 1238; Const. art. 13, § 1a).

8. Statutes 🔑72

Code giving right of eminent domain to educational institution of collegiate grade is not discriminatory in denying it to other educational institutions (Code Civ. Proc. § 1238, subd. 2; Const. art. 1, § 11, and art. 13, § 1a).

9. Statutes 🔑71

Legislature has right to establish classifications founded on some natural, intrinsic, or constitutional distinction (Const. art. 1, § 11).

10. Eminent domain 🔑40

University of Southern California *held* entitled to take by eminent domain land for use as portion of grounds surrounding newly constructed university library building, to be landscaped and to be intersected by paths to make entrance more readily accessible (Code Civ. Proc. §§ 1237, 1238; Const. art. 9, § 1, and art. 13, § 1a; Const. U. S. Amend. 14).

◆

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action in condemnation by the University of Southern California, a corporation, against Nancy H. Robbins. From a judgment for plaintiff, defendant appeals.

Affirmed.

McAdoo & Neblett, Frank G. Swain, and Judd D. Kimball, all of Los Angeles, for appellant.

Scarborough & Bowen, Hill, Morgan & Bledsoe, Vincent Morgan, and Stanley S. Burrill, all of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff brought this action in condemnation for the purpose of acquiring a certain parcel of land owned by defendant, which is required for use as a portion of the grounds surrounding a newly constructed university library. It is proposed to suitably landscape and beautify it with lawn and shrubs, and, by intersecting it with paths, to make the entrance to the library more readily accessible. The trial court determined that plaintiff was entitled to take the land for the purpose indicated, and awarded defendant compensation for the detriment caused to her. The adequacy of the award is not questioned, but defendant has appealed from the judgment on other grounds.

At the outset appellant challenges the right of respondent to exercise the power of eminent domain, and declares that the latter is endeavoring to take private property for private use, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

[1, 2] "Eminent domain is the right of the people or government to take private property for public use." Code Civ. Proc. § 1237. "The power of eminent domain, or the right to take private property for public purposes, inheres in the state as an attribute of its sovereignty, and is vested in the Legislature. The Legislature can take private property against the will of the owner only for public use and after just compensation to the owner has been paid or secured. Except as restricted and controlled by these two requirements, the power of the Legislature to take private property is unlimited and its determination so to do conclusive. Whether the use be public and whether proper compensation has been made are judicial questions, the final determination of which rests with the courts. All other questions involved in the taking of private property are of a legislative nature." State ex rel. Smith v. Van Reed (Knapp v. State), 125 Minn. 194, 145 N. W. 967, 968. "The legislature must designate, in the first place, the uses in behalf of which the right of eminent domain may be exercised, and this designation is a legislative declaration that such uses are public, and will be recognized by courts; but whether, in any individual case, the use is a public use, must be determined by the judiciary from the facts and circumstances of that case." Lindsay Irrigation Co. v. Mehrtens, 97 Cal. 676, 32 P. 802. "If the subject-matter of the legislation be of such a nature that there is any doubt of its character, or if by any possibility the legislation may be for the welfare of the public, the will of the legislature must prevail over the doubts of the court." In re Madera Irrigation Dist., 92 Cal. 296, 28 P. 272, 274, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; Walker v. Shasta Power Co., 160 F. 856, 87 C. C. A. 660, 19 L. R. A. (N. S.) 725. In upholding the right of a high school district to acquire by condemnation property for a high school gymnasium, our Supreme Court declared in 1919: "It is settled law that the power to determine what uses are public is vested in the Legislature." Kern County High School Dist. v. McDonald, 180 Cal. 7, at page 13, 179 P. 180, 183.

The section of our Code under which this action was brought is as follows: "Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses: * * * 2. Public buildings and grounds for use of a state, or any state institution, or any institution within the state of California which is exempt from taxation under the provisions of section 1a, of article 13 of the Constitution of the state of California, and all other public uses authorized by the legislature of the state of California." Code Civ. Proc. § 1238. The constitutional provision referred to sets out: "Any educational institution of collegiate grade, within the State of California, not conducted for profit, shall hold exempt from taxation its buildings and equipment, its grounds within which its buildings are located, not exceeding one hundred acres in area, its securities and income used exclusively for the purposes of education." Const. Cal. art. 13, § 1a.

Plaintiff is a university formed by the consolidation, under Civil Code, §§ 652 and 653, of two separate institutions, the one formerly known as "The University of Southern California," incorporated in 1880, and the other as "The College of Liberal Arts of the University of Southern California," incorporated in 1892. The consolidation of the two under the name of the University of Southern California was effected in 1928. The "amended articles of incorporation" under which plaintiff operates describes it as being "purely benevolent and beneficent in its purpose and organization," and appellant concedes that "it is a benevolent nonprofit corporation." The said articles also declare: "This university shall be open and equal privileges accorded alike to each and every resident of this state, whether male or female, and regardless of nationality, race or religious belief, who possess the required qualifications for entrance, and no person shall be denied admission to this university who possesses such qualifications. Such qualifications shall be of the same general character as those required by state colleges and universities in this state."

Appellant concedes that "no question can be raised that the University of Southern California and its new library offer cultural facilities which are valuable to the community," but protests that there is lacking that essential element of *right to use* which must be present to qualify a use as public in the sense in which we are considering it. In other words, the fact that respondent is a private corporation is not the basis of appellant's objection. It is rather the assumption by the latter that the use to which respondent proposes to devote the land is not a public use.

[3] The right of a private corporation to take land under the right of eminent domain for public use is not questioned. As to what constitutes a "public use," our California Supreme Court "has consistently held that 'public use' means 'use by the public,' and that to make a use public a duty must devolve on the person or corporation holding property appropriated by right of eminent domain to furnish the public with the use intended, and the public must be entitled, as of right, to use or enjoy the property taken." Gravelly Ford Co. v. Pope & Talbot Co., 36 Cal. App. 556, 178 P. 150, 153. The United States Supreme Court, in analyzing this matter, further clarifies the above definition when it observes that "it is obvious, however, that what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned. * * * It is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use." Fallbrook Irrigation District v. Bradley, 164 U. S. 161, 17 S. Ct. 56, 63, 41 L. Ed. 369.

[4] The framers of our State Constitution gave recognition to the high importance of education for a self-governing people and solemnly enjoined our lawmakers in the following language: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." Article 9, § 1. The Legislature, mindful of this duty, has enacted from time to time laws appropriately designed to make effectual this ideal, including the Code section under which this action is brought. In doing so it has properly assumed the power vested in it as a body composed of duly elected representatives of the citizens of this state, and has exercised a discretion which is a reasonable concomitant to the responsibility imposed upon it by the Constitution. The legal philosophy of our state with reference to education is discussed in Veterans' Welfare Board v. Riley, 189 Cal. 159, 208 P. 678, 682, 22 A. L. R. 1531. In that case the validity of an act which provided educational aid to veterans was upheld, and the Legislature's right to devote taxpayers' money to this useful purpose was confirmed. The law had been assailed on the theory that such aid amounted to a gift of public funds and was therefore unconstitutional. The court said: "Bearing in mind that the burden is primarily upon the state Legislature to determine whether or not the purpose served is a public purpose, and whether or not the development of the state requires the extension of educational facilities and the giving of additional opportunities to different types of students, it may safely be said that the question is one for the Legislature, and that the broad general restrictions upon the state Legislature prohibiting gifts should not be held to prevent reasonable allowances made to enable students to secure the advantages of educational institutions." Applying the same basic reasoning to the problem here presented, we conclude that the procedure which has been followed in this case by the Legislature and the trial court is in conformity with the purpose declared by the Constitution and the object which it sought to attain.

This view is expressed in the case of Connecticut College for Women v. Calvert, 87 Conn. 421, 88 A. 633, 636, 48 L. R. A. (N. S.) 485, when the court declares: "It is for the Legislature to say whether any given use is governmental in its nature or not, subject to review by the courts only in exceptional cases of extreme wrong, and in the present case we accept and indorse the legislative declaration that the higher education of women is in its nature a public use." Although relied on by appellant, the latter case is readily distinguishable from the case at bar. There the college lacked in its organic structure the very elements upon which the respondent here properly relies in asserting its right to take the property in question, and accordingly the court denied to the college the right to exercise the power of eminent domain. In the Connecticut case the court finds the college fatally deficient in the required elements, in the following words: "There is no allegation in the petition that the public has or can acquire the right to enjoy the benefits of the land sought to be taken, no provision to that effect in the petitioner's charter, and the stated corporate purposes of the petitioner are not such as to impose upon it as a necessary legal consequence of its corporate character the obligation of admitting to its courses of instruction all qualified candidates to the extent of its capacity without religious, racial, or social distinction."

In its discussion of principles involved in cases of this character the court in the case just cited noted the recognition by the United States Supreme Court (see Fallbrook Irrigation Dist. v. Bradley, supra) of the right of each state to declare those uses public which are necessary to the development of its natural resources, and added that "these cases proceed upon what appears to us to be the right of a state, as a measure of self-preservation, to prevent the stubbornness or avarice of a private proprietor from obstructing the development of its own physical resources." Even where it appears, as in this case, that no unworthy motive has led the property owner to question the seizure of her property for the proposed use, the same rule must be applied as in a case where private greed seeks to thwart public good. The same principle is again asserted in cases which uphold the taking of private property by a private cemetery corporation for a public use, for the reason that "the burial or other safe disposition of the dead is a necessity essential to the preservation of the health of the living." Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n, 77 Conn. 83, 58 A. 467, 469; In re Lyons Cemetery Ass'n, 93 App. Div. 19, 86 N. Y. S. 960. It could not reasonably be urged that the development of public utilities and natural resources or the burial of the dead are more truly public uses than the intellectual development of our citizens. The higher education of youth in its largest implications is recognized as a most important public use, vitally essential to our governmental health and purposes. From the very nature of respondent as an educational institution, with qualities fixed by its articles of incorporation above quoted, it is apparent that the land here considered will be devoted by it to a high public use; and its dedication to that objective is made further apparent by the fact that respondent seeks to acquire such property by these proceedings rather than by private purchase.

[5] Appellant cautiously foresees a possibility that the articles of incorporation of respondent may be amended or an arbitrary ruling adopted so as to infringe the rights which the public may now enjoy. It is well to look ahead to avoid possible action which would divest the public of some benefit which it rightly holds, yet we are constrained to measure men and institutions by their known qualities and records. The illustrious record of respondent university for half a century is a matter of common knowledge, and the creative altruism of its graduates who have become integrated into the life of our state bears impressive testimony to its ideals and purposes. It is unreasonable to suppose that such an institution, in view of its known record and character, would seek by trickery or evasion to deprive the public of the benefits of the property in question, which its articles of incorporation and its action in thus acquiring have in effect dedicated to public use. It is not the policy of the law under such circumstances to withhold public benefits or retard progress because of fear that some individual or group within an organization may attempt to do wrong or act ill-advisedly.

[6] As opposed to the views just expressed, appellant directs our attention to a certain bulletin, which she declares negatives the declaration of the articles of incorporation as to the public nature of respondent university. This bulletin, issued in connection with the college of pharmacy, says in part: "The university reserves the right to reject any applicant for admission, even though the applicant may meet the requirements here listed." Testimony at the trial disclosed that this admonition in the bulletin was to facilitate the exclusion of certain persons whose moral and ethical purposes were inimical to the university and to society. Since good morals and lawful purpose are as reasonably required of entrants to college as academic preparation, such a reservation could not be construed as a declaration of purpose contrary to that above discussed nor as a denial of full rights to an otherwise qualified applicant.

[7] A further question is raised as to whether respondent university is one of the institutions entitled to tax exemption under article 13, § 1a, Constitution of California, supra. It is urged that it is not entitled to such exemption because it is not an educational institution exclusively of collegiate grade. The basis for this contention is the disclosure by the university comptroller that certain "special" students were permitted to

take courses even though they had not the prerequisite of four years' high school education. The question is answered by Political Code § 3613, subd. 2, which says: "An educational institution of collegiate grade is deemed and defined to be an institution * * * which requires for regular admission the completion of a four-year high-school course or its equivalent. * * *" The evidence shows that respondent university complies with this requirement as to all regular students, and the giving of college courses to special students would not change the status of the institution as fixed by law.

[8, 9] It is urged that section 1238 of the Code of Civil Procedure, subd. 2, quoted above, is contrary to the provisions of article 1, § 11, of the Constitution of California, which provides that "all laws of a general nature shall have a uniform operation." The suggestion is made that the Code section referred to is discriminatory in giving the right of eminent domain to institutions such as respondent and denying it to other educational institutions. The Constitution (article 13, § 1a), however, establishes a certain class within which respondent naturally falls. The designation of educational institutions of collegiate grade as being a class separate and apart from secondary and elementary schools is both natural and constitutional (Pasadena University v. County of Los Angeles, 190 Cal. 786, 214 P. 868), and the Legislature has the right, as in the Code section cited, to establish classifications which are founded on some natural, intrinsic, or constitutional distinction. People v. Jordan, 172 Cal. 391, 156 P. 451; 12 Cor. Jur. 1128, § 855.

[10] It is finally argued that respondent has no authority under the law to take the land by these proceedings, because the land is not to be under the library building, but is to be used as grounds therefor, being landscaped and intersected by paths. Appellant's amended answer sets out that she then had on the parcel in question a drug store, a residence, two cottages, and two garages. Ordinary experience and judgment would indicate that a library, which is the center of much of the æsthetic, cultural, and educational life of a university, needs adequate provision for light, air, and freedom from the noise and confusion of business, as well as suitably artistic grounds and convenient paths. Our attention has not been directed to any authority which would support a suggestion to the contrary. On the other hand, the Code specifically provides that "the right of eminent domain may be exercised in behalf of * * * public buildings *and grounds*." (Italics ours.) The constitutional exemption from taxation likewise includes not only buildings, but also grounds. Its use as a part of the grounds surrounding the library affords additional reassurance to the public that its appropriate enjoyment by them will be more complete than if it were occupied by the building itself. In discussing the taking by a municipality of land for street purposes under the right of eminent domain, the New York Supreme Court, Appellate Division, said: "Land may also be taken, in connection with such specific use, for the purpose of furnishing ample space for the access of light and air, and also to beautify and adorn. A street may in part unite the two purposes, —one to furnish a way for travel, and the other as a park or public place." In re Curran (Curran v. Guilfoyle), 38 App. Div. 82, 55 N. Y. S. 1018, 1019. The same reasoning which allows the taking of sufficient land to permit the erection of a building of suitable dimensions would justify taking such further land as would fully and effectually carry out the purposes for which the building was erected. The taking of the land such as that in question was expressly contemplated by the Legislature and is in accord with the liberal construction given by our courts to such provisions of the law. Vallejo & Northern R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 P. 238; Kern County High School District v. McDonald, supra.

Judgment affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

1 Cal.App.2d 588

BUSH et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 5059.

District Court of Appeal, Third District, California.

Oct. 24, 1934.

Rehearing Denied Nov. 23, 1934.

1. Chattel mortgages 🔑155

Failure of chattel mortgagee to record certified copy of chattel mortgage with department of motor vehicles *held* not to affect validity of mortgage as against subsequent chattel mortgagee with full knowledge of prior mortgage (Civ. Code, § 2957; St. 1931, p. 2517, § 45¼).

2. Chattel mortgages 🔑153

Where purpose of statute providing that chattel mortgage on motor vehicle was invalid as against subsequent incumbrancer unless registered was to furnish constructive notice of mortgage to subsequent incumbrancer, statute *held* to mean that mortgage was void when not registered as against subsequent incumbrancer in good faith for value without previous knowledge of prior mortgage (Civ. Code, § 2957; St. 1931, p. 2517, § 45¼).

3. Chattel mortgages 🔑83

Statute providing that chattel mortgage on motor vehicle was invalid as against subsequent incumbrancer unless registered *held* not in conflict with statutory requirement that subsequent incumbrance must have been in good faith to defeat previous mortgage because of lack of notice thereof, so that second statute was not repealed by provision of first statute repealing all statutes in conflict therewith, but the two statutes would be construed together (Civ. Code, § 2957; St. 1931, p. 2100, § 1; p. 2517, § 45¼).

4. Chattel mortgages 🔑153

Where statute provided unrecorded chattel mortgage should be void as against subsequent incumbrancer in good faith and for value, term "good faith" must be construed according to equity jurisprudence since foreclosure of chattel mortgage is an equitable proceeding (Civ. Code, § 2957).

Appeal from Superior Court, Stanislaus County; H. S. Schaffer, Judge.

Action by David F. Bush and another against the Bank of America National Trust & Savings Association, a national banking association. From a judgment for the defendant, plaintiffs appeal.

Affirmed.

Vernon F. Gant, of Modesto, for appellants.

T. B. Scott, of Modesto, and Louis Ferrari, T. J. Bricca, and W. E. Johnson, all of San Francisco, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment which was rendered against the plaintiffs in an action for the alleged conversion of two automobiles. It is claimed the defendant's mortgage on the machines is void for failure to record it with the department of motor vehicles as required by section 45¼ of the California Vehicle Act (St. 1923, p. 517, as added by St. 1929, p. 517, as amended by St. 1931, p. 2517).

It appears without conflict of evidence that on February 21, 1932, T. S. and Homer S. Pendergrass executed and delivered to the defendant their chattel mortgage on certain personal property, including the two automobiles which are involved in this suit, to secure the payment of a debt of $30,000 which the mortgagors owed to the banking association. This mortgage conformed to the provisions of section 2957 of the Civil Code. It was promptly recorded in the office of the county recorder of Stanislaus county. But it was not recorded with the department of motor vehicles of the state of California as required by section 45¼ of the California Vehicle Act. It is conceded the plaintiffs examined this mortgage as it was disclosed by the public record thereof, and knew of its existence and purport. For failure to pay the debt pursuant to the terms of the mortgage, the bank took possession of the automobiles and sold them on foreclosure of the mortgage, applying the proceeds therefrom to the satisfaction of the debt.

After the plaintiffs secured actual knowledge of the defendant's mortgage, for value received, T. S. and Homer S. Pendergrass executed and delivered to them their promissory note for $5,000, together with their chattel mortgage on the two automobiles hereinbefore mentioned. This second chattel mortgage conforms to the provisions of section 2957 of the Civil Code, and it was duly recorded. The plaintiffs also promptly filed with the department of motor vehicles, as required by section 45¼ of the California Vehicle Act, a certified copy of their chattel mortgage.

After the defendant's foreclosure and sale of the automobiles, plaintiffs demanded payment of the value of the machines on the theory that the defendant's chattel mortgage was void for failure to conform to the provisions of section 45¼ of the California Vehicle Act. The demand for payment was refused. This suit for conversion was then instituted. The cause was tried by the court sitting without a jury. Findings were adopted by the court favorable to the defendant. A judgment was rendered accordingly. From that judgment, the plaintiffs have appealed.

[1] We are of the opinion the defendant's failure to conform to the provisions of section 45¼ of the California Vehicle Act by recording a certified copy of their chattel mortgage with the department of motor vehicles of the state of California does not affect the validity of their mortgage under the circumstances of this case as against the plaintiffs for the reason that the plaintiffs were subsequent mortgagees of the automobiles with full knowledge of the defendant's previous mortgage, and that plaintiffs therefore were not in good faith in accepting their subsequent mortgage. The plaintiffs' mortgage is subject to the known prior interest of the defendant. Silverthorn & Sons v. Pacific Finance Corp., 133 Cal. App. 163, 23 P. (2d) 798.

Section 2957 of the Civil Code provides that:

"A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless:

"1. It is accompanied by the affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay, or defraud creditors;

"2. It is acknowledged or proved, certified, and recorded in like manner as grants of real property."

Section 45¼ of the California Vehicle Act, which was passed by the Legislature subsequent to the enactment of section 2957 of the Civil Code, modifies the provisions of the last-mentioned section with respect only to the "recording of mortgages on personal property." Its provisions are otherwise in full force and effect. Section 45¼ of the California Vehicle Act provides, in part:

"(a) No chattel mortgage on a motor vehicle or any other vehicle defined in this act, shall be valid as against creditors or subsequent purchasers and encumbrancers until the mortgagee therein named is registered as the legal owner thereof in the manner provided for the registration of motor vehicles under the provisions of this act.

"(b) A chattel mortgage on a motor vehicle, or any other vehicle defined by this act, is hereby excepted from the provisions of * * * section 2957 of the Civil Code which relate to the recording of mortgages on personal property."

[2] Since the preceding section of the California Vehicle Act is specifically designated therein to have been enacted for the purpose of furnishing "constructive notice of the said mortgage and its contents to subsequent purchasers and encumbrancers," it may be reasonably construed to mean that a mortgage is void when it is not recorded with the department of motor vehicles as therein provided, "as against creditors or subsequent purchasers and encumbrancers," who have acquired their interest in the automobile in good faith for value and without previous knowledge of the former defective mortgage. It would be contrary to justice and equity and public policy to forfeit a chattel mortgage and defeat the lien for the payment of a valid debt for the mere failure to conform to a statute requiring a copy of the mortgage to be recorded in the department of motor vehicles so as to give adequate notice thereof, when the subsequent mortgagee previously had full knowledge of the existence and contents of the previous mortgage. To hold that the mortgage is void under such circumstances is in direct conflict with the declared purpose of the act which is to furnish "constructive notice of the said mortgage and its contents to subsequent purchasers and encumbrancers."

[3] The motor vehicle provision above referred to was adopted for the avowed purpose of furnishing notice of the existence of a mortgage and its contents to subsequent purchasers and incumbrancers, by adding to the notice required by section 2957 of the Civil Code a further notice afforded by recording a certified copy thereof with the department of motor vehicles. There is nothing in the California Vehicle Act to indicate that the Legislature intended to dispense with that portion of section 2957 of the Civil Code which renders a chattel mortgage on vehicles void except as against a subsequent purchaser or incumbrancer of the property who does not acquire it "in good faith and for value." Nor does the reference to the general title of the California Vehicle Act, which title declares that it is "An Act regulating traffic on streets and highways and to regulate the use and operation of vehicles * * * and to repeal all acts or parts of acts in conflict with this act" (St. 1923, p. 517, as amended by St. 1931, p. 2100, § 1), aid the appellants. The just and equitable requirement of section 2957 of the Civil Code that a subsequent purchaser or

incumbrancer of an automobile must have been in good faith in order to defeat a previous mortgage because of lack of notice thereof, is not in conflict with section 45¼ of the California Vehicle Act. These acts may be reasonably construed together so as to support both of them as hereinbefore suggested.

[4] The foreclosure of a chattel mortgage is an equitable proceeding. The term "good faith," as it is employed in section 2957 of the Civil Code, is borrowed from equity jurisprudence and must be construed accordingly. Cardenas v. Miller, 108 Cal. 250, 257, 39 P. 783, 41 P. 472, 49 Am. St. Rep. 84. Our courts have frequently held that an unrecorded mortgage is not void as against a subsequent purchaser or incumbrancer who has actual knowledge of the previous lien for the reason that he does not acquire his interest in good faith. Harms v. Silva, 91 Cal. 636, 27 P. 1088; Silverthorn & Sons v. Pacific Finance Corp., 133 Cal. App. 163, 23 P.(2d) 798; Cardenas v. Miller, 108 Cal. 250, 39 P. 783, 41 P. 472, 49 Am. St. Rep. 84; Kahriman v. Jones, 203 Cal. 254, 263 P. 537; Jones on Chattel Mortgages (4th Ed.) p. 342, § 312. The author of that text on chattel mortgages last cited, says that, as an equitable principle:

"Notice to a subsequent purchaser or mortgagee of an unrecorded mortgage before the completion of the sale or mortgage is conclusive evidence of mala fides on his part, so that his title will be subject to the equitable rights of the holder of such unrecorded mortgage.

"Under this rule it does not matter that the prior mortgage of which there is actual notice is defective and voidable as to bona fide purchasers. The notice charges the subsequent purchaser with knowledge of all the facts at that time existing relative to the mortgage, and he stands at best in no better position than his vendor."

It follows that since the plaintiffs had actual knowledge of the existence and contents of defendant's chattel mortgage on the two automobiles at the time they received the subsequent note and mortgage thereon, their claim is subject to the superior title of the defendant, and an action for conversion on the part of plaintiffs under such circumstances does not lie.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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2 Cal.App.2d 1

HANEY v. TAKAKURA.

Civ. 5145.

District Court of Appeal, Third District, California.

Nov. 5, 1934.

As Amended Dec. 3, 1934.

1. Automobiles ⚷181(3)

One riding in another's automobile, driven by owner, to city for purpose of assisting him in marketing oranges at his request, *held* not "guest," but passenger "rendering compensation" (St. 1931, p. 1693, § 141¾; Civ. Code, § 1605).

"Compensation" has been defined as that which constitutes or is regarded as equivalent or recompense, makes good lack or variation of something else, compensates for loss or privation, amends, remunerates, or recompenses; word "benefit," as used in Civil Code, § 1605, describing consideration as benefit conferred or prejudice suffered, means advantage, profit, gain, whatever contributes to or promotes prosperity, adds value to property, or enhances value; while "guest" in automobile has been described as one accepting owner's hospitality and taking ride for his own pleasure or on his own business without making return to or conferring benefit other than pleasure of his company on driver.

[Ed. Note.—For other definitions of "Benefit," "Compensation" and "Guest," see Words & Phrases.]

2. Automobiles ⚷181(1)

Automobile owner, whose request that another accompany him to city for purpose of assisting him to market his oranges was accepted, became impliedly obligated not to endanger such invitee by negligence in driving automobile.

3. Automobiles ⚷245(24)

Whether one riding in another's automobile is guest or passenger giving compensation is question of law, but facts must be found by jury, which should be instructed that such person is guest or one giving compensation if they find certain facts (St. 1931, p. 1693, § 141¾).

4. Trial ⚷199

Instructions in action for injuries to one riding in automobile driven by defendant that person conferring any benefit on one in whose vehicle he accepts ride may thereby pay compensation for ride and that statutory phrase, "without giving compensation therefor," named as essential element in definition of "guest," means "definite benefit" to driver, *held* erroneous as submitting law question of plaintiff's status and uncertain because of failure to define "definite benefit" (St. 1931, p. 1693, § 141¾).

5. Appeal and error 🔑1170(9)

Appellate court cannot determine whether erroneous instructions, submitting law question whether plaintiff in action for injuries sustained while riding in automobile driven by defendant was latter's guest, resulted in miscarriage of justice, in absence of contention that verdict for plaintiff is not sustainable on theory of implied finding that defendant was not negligent (Const. art. 6, § 4½).

6. Appeal and error 🔑1170(9)

To reverse judgment for errors in giving or refusing instructions, it must affirmatively appear to appellate court that such errors resulted in miscarriage of justice (Const. art. 6, § 4½).

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by J. A. Haney against K. Takakura. Judgment for defendant, and plaintiff appeals.

Affirmed.

Gumpert & Mazzera and C. H. Hogan, all of Stockton, for appellant.

Nutter & Rutherford and A. P. Hayne, all of Stockton, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff and the defendant in this action were, during the times mentioned herein, neighbors residing near Orosi, in Tulare county, engaged, among other things, in the raising and marketing of oranges. The plaintiff is, and was during all of the time, a man very well informed as to general market conditions, giving considerable attention thereto, and at times making trips to the city of Oakland, where he gained further information as to market conditions.

The record shows that in the month of November, 1932, the defendant had on hand approximately 2,000 boxes of oranges, which he desired to sell and was uncertain as to whether he should send the oranges to the eastern markets, or attempt to dispose of them in Oakland. Being aware that Mr. Haney was better informed than he on the subject of market conditions, the defendant asked the plaintiff to accompany him to Oakland and aid him in securing the best available market in which to sell his oranges. The plaintiff agreed to accompany the defendant to Oakland, for that purpose, and on the 21st day of November, 1932, the plaintiff and the defendant started to Oakland, riding in the defendant's automobile, a Dodge sedan, which during the entire trip was driven by the defendant. The start was made about 3 p. m. Everything went well until the parties reached a place on the highway known as Dublin Canyon, a few miles west of the town of Dublin, when the automobile driven by the defendant, while running at a speed of from 30 to 35 miles an hour, ran off the highway on the right side thereof, into an embankment along the edge of the highway and upset, and thereafter caught fire and burned. The accident happened at approximately 8:30 p. m. As a result of the accident, the plaintiff was injured, and thereafter brought this action against the defendant for negligence, alleging that the defendant negligently and carelessly allowed the automobile to run off the highway and upset. The answer of the defendant denies the alleged negligence, and sets up the affirmative defense that the plaintiff was riding as a guest of the defendant at the time of the accident.

The judgment went for the defendant, and the plaintiff appeals.

[1] Upon this appeal reliance is had upon the alleged error of the trial court in modifying instructions proposed by the appellant, and also in refusing certain requested instructions. These instructions are all directed as to the question of whether the plaintiff was or was not riding as a guest with the defendant at the time of the accident. Both the defendant and the plaintiff testified to the same state of facts relative to the purposes of the trip, the plaintiff testifying that he was requested by the defendant to accompany the defendant to Oakland for the purposes of assisting the defendant in marketing to the best possible advantage the oranges then owned and possessed by the defendant, and which he was desirous of marketing. The defendant likewise testified that he had requested the plaintiff to accompany him to Oakland in his, the defendant's, automobile. for the purpose of assisting him, the defendant, in marketing the oranges which he desired to sell. For the reasons hereinafter stated, and the authorities cited, we are satisfied that this state of facts removed the plaintiff from the status of a guest, and that he was riding with the defendant in the defendant's automobile as a passenger rendering compensation.

The last paragraph of section 141¾ of the California Vehicle Act (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693), applicable here, reads: "For the purpose of this section the term 'guest' is hereby defined as being a person who accepts a ride in any vehicle without giving compensation therefor." As defined in Webster's New International Dictionary, cited in the case of Crawford v. Foster, 110 Cal. App. 81, 293 P. 841, 842, "compensation" is defined as follows: "That which constitutes, or is regarded as an equivalent or recompense; that which makes good the lack or variation of something else; that which compensates for loss or privation; amends; remuneration, recompense." The consideration is described as "any benefit conferred * * * or any prejudice suffered." Civ. Code, § 1605. The word "benefit," as used in the Code, in many instances having no technical meaning, we think, here, means advantage, profit, gain; whatever contributes or promotes prosperity; adds value to property; enhances value. 7 C. J. 1136, 1137.

The purpose of the trip was to find a market for the 2,000 boxes of oranges; the purpose of the defendant in requesting plaintiff to accompany him in his, the defendant's, automobile, to Oakland, was to market the oranges in the best available market, thereby yielding to the defendant additional value to his property; likewise, promoting to some extent, his prosperity in securing the best price available for his oranges. Likewise, it was the purpose of the plaintiff in accompanying the defendant, at the defendant's request, to assist the defendant in securing added value to his oranges in the way of marketing the same for the highest possible price. That such service is rendering compensation, we think, needs only the mere statement to demonstrate its correctness, and comes clearly within the quoted provisions of the California Vehicle Act, supra.

In the case of Crawford v. Foster, supra, the question of whether one riding in an automobile is rendering compensation or is a mere guest, is considered at length. A guest is there described as one "who accepts such hospitality; and who takes a ride either for his own pleasure or on his own business, without making any return to or conferring any benefit upon the driver of the car, other than the mere pleasure of his company."

The testimony of both the plaintiff and the defendant in this case shows that such was not the purpose of either the plaintiff or the defendant in causing the plaintiff to accompany the defendant in his automobile on the trip to Oakland.

In the case of Crawford v. Foster, supra, the facts under consideration showed that the plaintiff was taking a ride in an automobile with an automobile salesman who was demonstrating the car for the purpose of making a sale thereof to the plaintiff, the benefit or compensation in that case being the prospective sale by the defendant to the plaintiff. The benefit which would ultimately accrue to the defendant would be found in the purchase price to be paid by the plaintiff to the defendant. It matters not whether that compensation was direct or indirect. It was the usual, and we might say in most instances, a necessary act to be performed by the defendant or one of his salesmen in order to induce what is called a prospect to become an actual purchaser.

A somewhat similar question was before the court in the case of Sullivan v. Richardson (defendant) and McCord et al. (appellants), 119 Cal. App. 367, 6 P.(2d) 567, 569. The plaintiff in that case was a prospective purchaser of real estate; was taken for a ride in an automobile for the purpose of viewing the property being offered for sale by the defendant. It was contended by the appellant McCord that he was entitled, as a matter of law, from the evidence, to the finding that the plaintiff was a guest. The court found that the appellant was a passenger. The opinion of the court is as follows: "Under the law, she could not be held to occupy both relationships of 'guest' and 'passenger' at the same time and under the same circumstances. To be a passenger does not necessarily imply that there should be payment in money for transportation. Champagne v. A. Hamburger & Sons, 169 Cal. 683, 692, 147 P. 954. It may be by contract, either express or implied, and the contract need not be between the carrier and passenger, but may be between the carrier and a third person for the passenger. Orr & Lanning v. Boockholdt, 10 Ala. App. 331, 65 So. 430, 431. 'It is enough that there is any consideration for the carriage. * * *'" Citing additional cases. Here, as we have stated, the record shows that there was a consideration for the carriage,—the possible securing by the defendant of a higher price for the oranges that he had to sell, if accompanied by the plaintiff, than the defendant could hope to obtain if he entered the markets unaided by one familiar with market conditions.

In Sumner v. Edmunds, 130 Cal. App. 770, 21 P.(2d) 159, the plaintiff in the action was being driven over a paper route for the purpose of familiarizing himself therewith. No contract of employment had been entered into, but there was such employment in prospect, and it was necessary on the part of the plaintiff to be familiar with the route over which he was to distribute papers when engaging in such employment or occupation. While being driven over the route, the plaintiff was injured. The defense that the plaintiff was a guest was interposed in that action and held not well taken. The citations found in the opinion in the Sumner Case, supra, are too numerous to be set forth herein, but they are all to the effect that there is a distinction between one riding as a mere guest gratuitously for his own pleasure, and where he is conferring some benefit upon the driver or, as we have stated elsewhere herein, adding to the value of the defendant's property or increasing his prosperity.

In the case of Bookhart v. Greenlease-Lied Motor Co., 215 Iowa, 8, 244 N. W. 721, a case parallel to that of Crawford v. Foster, supra, was under consideration by the Supreme Court of Iowa. It was there held that a prospective purchaser, injured while being given a demonstration, was not a guest, but occupied the position of one rendering compensation.

To the same effect is the case of Hall v. Smith, 283 Mass. 166, 185 N. E. 850. The facts are different in this latter case, but the principle held determinative therein is the same.

[2] In none of the cases which we have cited is it held that what is termed a legal contractual relation should exist between the parties in order to remove the plaintiff from the status as a guest. In the instant case there was no enforceable contract entered into between the plaintiff and the defendant. However, upon the acceptance by the plaintiff of the defendant's request that the plaintiff should accompany him to Oakland for the purpose hereinbefore mentioned, there did arise the implied obligation on the part of the defendant not to endanger the person or life of the plaintiff by any negligent act in driving his automobile.

[3] It is clear from what we have stated that the appellant was entitled to have the jury instructed that if they believed from a preponderance of the evidence that the defendant requested the plaintiff to accompany him to Oakland for the purpose of assisting him in the marketing of the oranges belonging to the defendant, and that the plaintiff accompanied the defendant for such purpose, then and in that case the plaintiff was not a guest of the defendant while riding in the defendant's automobile. This is in substance one of the instructions requested by the plaintiff and refused by the court, on the theory that it had been covered in other instructions. This, an examination of the record reveals not to be the case. In the instant case the use of the word "preponderance" would have been unnecessary, as the plaintiff and defendant both testified that the purposes of the trip were for the objects covered in the instruction tendered by the plaintiff. The status of one riding in another's automobile, as to whether he is a guest, or whether he is one riding therein and giving compensation therefor, is a question of law, just as whether, in an action for damages on account of malicious prosecution, the facts of the case enforce the conclusion of law that there was probable cause. Ball v. Rawles, 93 Cal. 222, 28 P. 937, 27 Am. St. Rep. 174. The facts are to be found by the jury, and the jury should be instructed that if they have found certain facts, then the conclusion of law would be either that the person so riding was a guest, or one giving compensation, just as we have set forth above.

[4] The court gave to the jury the following instructions, the first instruction being at the request of the plaintiff:

"You are instructed that the term 'guest' used in the Motor Vehicle Act of this State, means a person who accepts a ride in any vehicle without giving compensation therefor. You are instructed that the term 'compensation' does not necessarily mean the payment of money or the transfer of property of any description from one person to another. A person who confers any benefit upon another in whose vehicle he accepts a ride *may* thereby pay a compensation for such ride.

"The phrase 'without giving compensation therefor,' which I have named as an essential element in the definition of the word 'guest' means a definite benefit to the driver and owner of the car either absolute or contingent, and it does not include such incidental benefits to the driver as come solely from his pleasure in the passenger's company, or acts of courtesy during or after the ride which the passenger might perform for his driver, however valuable to the driver these acts of courtesy might in fact be."

Changing the instructions, however, so that the word "may" which we have italicized was inserted in lieu of the word "does" which appeared in the proffered instruction.

These instructions leave to the jury the determination of the law as to the status occupied by the plaintiff. They might have found the facts just as testified to by both the plaintiff and the defendant, and then come to the conclusion that the services agreed to be performed by the plaintiff did not constitute compensation. Likewise, the term "definite benefit" left to the jury an uncertain field in which to ascertain if under the law a benefit was to be conferred by the plaintiff upon the defendant. Without some definition of the words "definite benefit," as we have shown in our citation of Corpus Juris, supra, the jury was left without any definite instruction as to the facts which would establish the relationship of the parties.

These instructions appear to be based upon the language used in the opinion of the court in the case of Crawford v. Foster, supra. While the language of the learned court in that case is clear and distinct as to the points being decided, we can only say that it is seldom that the language used in an opinion in the decision of a case is appropriate in giving instructions to the jury, for the reason that the jury has the duty of the finding of facts, and the court has the duty of applying the law.

[5, 6] The court did not err in refusing to instruct the jury as to the negligence of the defendant in falling asleep, as there is no substantial testimony that such was the case. We are thus faced with the crucial question: Did the error of the court in the matter of instructions to the jury result in a miscarriage of justice?

If the jury found for the defendant on the theory that the plaintiff was a guest, then there was a miscarriage of justice. On the other hand, if the jury found against the plaintiff on the theory that the defendant was not guilty of negligence, then there was no miscarriage of justice.

Section 4½ of article 6 of the Constitution prohibits the granting of a new trial on the ground of misdirection of the jury, unless, after an examination of the entire cause, the appellate court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. As presented to us, we cannot give an affirmative answer to the question of whether there has been a miscarriage of justice. No contention is made upon this appeal that the verdict of the jury should not be sustained, on the theory of its implied finding that the defendant was not guilty of negligence. It is not sufficient that the court is able to say that it cannot be determined whether tnere has or has not been a miscarriage of justice. For a reversal to be ordered on account of errors committed in the giving or refusing of instructions to the jury, it must affirmatively appear, and the court must affirmatively be of the opinion that there has been a miscarriage of justice.

That the court must be affirmative in its opinion as to there having been a miscarriage of justice, see the case of Rodetsky v. Nerney, 72 Cal. App. 545, 237 P. 791, 792, where it is said: "It is not within our province, nor can we from the record weigh the testimony or determine the credibility of witnesses from all the facts that appear to the jury, many of which, due to their nature, cannot be recorded; but we are required to do so to the extent possible therefrom. Hirshfeld v. Dana, 193 Cal. 142, 223 P. 451; People v. O'Bryan, 165 Cal. 55, 130 P. 1042. Before an appellate court may reverse the judgment of a trial court it must be of the opinion that the error complained of has resulted in a miscarriage of justice. Such may not be assumed, but the result must fairly and reasonably appear from the whole record. For us to say that we cannot determine therefrom that the error complained of did not have that result is not sufficient. Our conclusion in the premises must be an affirmative one. People v. Chapman, 55 Cal. App. 192, 201, 203 P. 126; People v. Mazzurco, 49 Cal. App. 275, 280, 193 P. 164; Const. art. 6, § 4½; People v. O'Bryan, supra; People v. Roe, 189 Cal. 548, 561, 209 P. 560." See, also, the more recent case of Etienne v. Kendall, 202 Cal. 251, 259 P. 752.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

In re VUCINICH'S ESTATE et al.*

ANGELICH v. VUCINICH.

Civ. 9961.

District Court of Appeal, Second District,
Division 2, California.

Oct. 27, 1934.

Hearing Granted by Supreme Court
Dec. 24, 1934.

1. Guardian and ward 🔑163

Orders settling guardians' accounts are not res judicata, and probate court may reexamine accounts and correct, revise, or modify in amount or entirely disallow items of expenditures previously approved by it.

2. Guardian and ward 🔑161

Probate court's finding on conflicting evidence that item of expenditure in guardian's account was not supported by proper and authentic vouchers cannot be disturbed on appeal from order settling account.

3. Guardian and ward 🔑157

Evidence that minors' uncle in foreign country returned to their guardian in state draft secured from latter, with request, complied with by guardian, for new one, after time for negotiation of original draft, *held* insufficient to support probate court's finding that amount of new draft was duplication of similar item in bank's statement of amounts transmitted by guardian to uncle for wards' support.

> Record of bank transactions showed no item or group of items in amount similar to that of draft and evidence clearly indicated that new draft was substituted before earliest bank transmittal.

4. Guardian and ward 🔑157

Probate court's disallowance of credit to minors' former guardian for sums transmitted to their uncle in foreign country for their support *held* erroneous, in absence of substantial evidence that such sums were sent on guardian's personal account to purchase foreign currency, for which guardian stated in letter of different date to uncle that guardian was sending draft for different sum.

5. Guardian and ward 🔑144

Superior court, sitting in probate, has jurisdiction to determine amount of minors' money or property in their guardian's hands for purpose of charging him therewith and all necessarily incidental issues (Probate Code, § 1606).

6. Courts 🔑200½

Probate court's power to determine what money or other property of minors' estate is in their guardian's hands for purpose of charging him therewith is limited, where title thereto is in controversy, to cases in which guardian claims property as individual (Probate Code, § 1606).

7. Courts 🔑200½

Superior court, sitting in probate, is without jurisdiction to try question of title to property as between minors' guardian and strangers to their estate (Probate Code, § 1606).

8. Courts 🔑200½

To oust probate court of jurisdiction to determine what money or property of minors is in possession of their guardian, asserting claim of another thereto, existence of actual serious question as to whether property belongs to estate or stranger thereto must appear.

9. Courts 🔑200½

Superior court, sitting in probate, had power to determine claim, asserted by minors' former guardian, that money, left with him by their custodian, belonged to latter and to surcharge guardian's account with amount thereof.

10. Courts 🔑202(5)

Minors' former guardian, not demurring to or objecting to form or substance of written objections to allowance of his final account at trial, which proceeded on theory that issue of title to money, with which account was surcharged, was before court, waived contention that pleadings were insufficient to put such title in issue and cannot first raise such issue on appeal.

◆

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

In the matter of the estate and guardianship of Voslave Vucinich and others, minors. From an order settling the final account of Bozo Angelich, former guardian, after a hearing, at which Vladimir Vucinich, present guardian, filed objections, the former guardian appeals.

Modified and affirmed as modified.

Henry E. Carter, of Los Angeles, for appellant.

Vladimir Vucinich, of San Francisco, and Jennings & Belcher, of Los Angeles, for respondent.

WILLIS, Justice pro tem.

This is an appeal by the former guardian of the estate of three minors from an order settling his final account. He was appointed guardian on June 9, 1920, and rendered his first account on October 5, 1927, which was

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*For subsequent opinion see 44 P.2d 567.

settled without objections on November 1, 1927. Up to this latter date he had been authorized to expend the sum of $150 per month for the support of the minors, and on such date the court by order reduced that amount to $100 per month. In his first account he claimed credit for, and was allowed on settlement thereof the sum of $9,600 for support during the elapsed period. He was also allowed at this time $150 for attorney's fees. On August 25, 1932, he filed his second account, which, after objections heard, was approved and settled on January 20, 1933. In this account he claimed credit for, and was allowed for support of the minors, the sum of $2,550, covering the period from filing of first account in August, 1927, to September, 1929, and the additional sums of $606.11, cash advanced to, and of $1,200 for support of one of the minors, who had been returned to his personal custody, and the further sum of $1,185.70 for moneys advanced for the other two minors (who were during the period in Jugo-Slavia) from September 19, 1929, to July 29, 1932. By the order approving this second account, the guardian was allowed the further sum of $350 for attorney's fees, and his compensation as guardian was fixed at the sum of $1,200. Also by this order he was surcharged the sum of $206.37 for overcharge for street assessments and taxes. In making its order settling this account the court therein did so "without prejudice on final settlement to the said objections being re-presented." The record herein fails to show any objections on file to this second account, but the order approving it recites that the minors had filed objections.

On February 14, 1933, appellant filed his third and final account, which included only one new item, and to allowance thereof the minors filed certain objections in writing. At the hearing, over appellant's objection, evidence was received touching expenditures and items settled in the first and second accounts, and by the order of settlement certain changes and reductions were made therein. In addition, appellant was surcharged in the sum of $7,715.16 as and for cash belonging to the minors and which had come into his possession and not by him returned in his inventory or reports or accounted for. The items of $350 for attorney's fees and $1,200 for guardian's services were again allowed and settled. By this order the court allowed $3,000 in lieu of $9,600 in the first account, allowed the items of $606.11 and $1,200 in the second account, and disallowed the items of $2,550 and $1,185 therein, thus reducing the total claims for support of the minors as allowed in the two previous accounts from $15,141.81 to $7,451.11, and adjudged that the difference between these two latter sums, to wit, $7,690.70, be added to his charges together with the surcharge of $7,715.16, making a total of $15,405.86, to be added to the inventoried real estate liabilities of $24,000, making a total charge against the appellant of $39,405.86, less $256.04 deficit as shown in final account. From this was deducted the amount on hand in the form of inventoried and appraised real estate, to wit, $24,000, leaving the sum of $15,149.82, in which amount the court found appellant was indebted to the estate and which the court ordered paid by appellant to his successor as guardian of the minors along with delivery of the real estate shown in the inventory and reports.

From this order, this appeal is prosecuted, appellant assigning as error (1) the disallowance of the $9,600 item for support as allowed in the first account, except as to $3,000 thereof; (2) the disallowance of items of $2,550 and $1,185.70, previously allowed in the second account; (3) the deduction of $1,500 from the total of bank remittance statements of $4,145; (4) in charging appellant with $7,715.16, cash not inventoried or accounted for; (5) in finding that appellant was indebted to the estate in the sum of $15,149.82; (6) in disallowing the first and second accounts as formerly settled; (7) in not giving credit for the sums of $585.30 and $160, transmitted through the banks for support of said minors.

In an orderly and logical process of consideration of the matters brought forward by this appeal we must first consider and determine point 6, which embodies the proposition that the court erred in reopening, over appellant's objection, and considering the first and second accounts and disallowing items thereof formerly allowed and settled, in turn reflected by specifications of error numbers 1 and 2 above.

[1] Unlike orders settling accounts of executors and administrators, when final, those settling guardians' accounts do not come within the rule of res judicata. The probate court is not precluded from a re-examination of former accounts rendered by a guardian of estates of minors, and on such re-examination it has power and authority to correct, revise, or modify in amount any item or items of expenditure theretofore settled, allowed, or approved by it, or to entirely disallow and withhold its approval or settlement of such item or items. Such is the rule first an-

nounced in this state in the case of Guardianship of Cardwell, 55 Cal. 137.

[2] Under this rule the authority or power of the probate court to disallow items in the first and second accounts at the hearing on the final account must be conceded; and as to those items, the single remaining question relates to the sufficiency of the evidence to sustain the court's action. We have examined the transcript of evidence and proceedings given and had at the hearing and find therein ample support for the court's conclusions, except in two particulars reflected in the third and seventh specifications, hereinafter disposed of. It appears therefrom that from the date of his appointment on June 9, 1920, until November 1, 1927, the guardian was authorized to expend the sum of $150 per month for the support of the three minor children, which amount was reduced by the order of November 1, 1927, to the sum of $100. During all of this time, excepting for the first seven or eight months, the children were in the actual custody of their uncle, George Vucinich, in Jugo-Slavia, and from time to time appellant transmitted moneys to the latter for the support of the children. In his first and second accounts the guardian claimed credits for amounts equaling the result of multiplying months elapsed by $150 or $100, as the case might be, and presented voucher receipts purporting to cover each of such months. He admitted that these receipts were given to conform to the order of allowance and were not in truth related in point of time or amounts to the actual payments or transmittals of money. At the hearing on the final account the amount of those transmittals was inquired into, and, as a result of the evidence adduced at the hearing, the probate court disallowed the former item for support of $9,600 with its vouchers in the first account and allowed in lieu thereof the sum of $3,000, which had been delivered in cash to the uncle on his leaving for Europe, and disallowed the items of support of $2,250, with vouchers, and $1,185.70 in the second account, and allowed altogether as and for support over the entire period the sum of $7,451.11. The item of $1,185.70 appearing in the second account was claimed by appellant to have been sent to Jugo-Slavia in many small amounts for support of the minors from September 19, 1929, to December 18, 1930, and was supported by a voucher purporting to be signed by the widow of George Vucinich, the latter having died in 1932. The court found that this item was not supported by proper and authentic vouchers and that such expenditures were not made. This finding of the probate court we cannot here disturb, as the evidence relating thereto was conflicting; and the burden resting on appellant to support his claims with satisfactory vouchers, it was the exclusive province of the probate court to weigh the evidence and decide.

[3] In dealing with the claims of appellant for support money sent to Jugo-Slavia, both appellant and objectors introduced evidence as to the manner, dates, and amounts of actual transmittals of money. The principal proof came from bank statements, which showed on their face the amounts transmitted by appellant. The court found that these aggregated the sum of $4,145, less the sum of $1,500 which the court found was a duplication. The evidence amply supports the finding that $4,145 comprised the whole amount sent by appellant through the two local banks to George Vucinich over the period of guardianship, but there does not appear in the record any evidence sufficient to support the finding that $1,500 thereof was a duplication of a similar item. There was some evidence to the effect that George Vucinich, some time after he went to Jugo-Slavia in 1920, sent back to appellant a $1,500 draft which he had secured before leaving and had carried with him but had kept too long for negotiation, with a request that appellant have a new one substituted for it. This appellant did; and the objectors claim and the court found that that item of $1,500 constitutes part of the $4,145 of total bank transactions. The record of those transactions failed to show any similar item or group of items equivalent thereto and all the evidence given on the subject indicates clearly that this draft substitution took place in 1920, while the earliest local bank transmittal is dated May 15, 1925, and covers a period from that date to August 29, 1932.

[4] The foregoing disposes of specifications numbered 1, 2, 3, and 6, and closely related thereto is specification number 7, concerning the disallowance by the court of credits for $585.30 and $160, transmitted by appellant to George Vucinich and supported by receipts of Slavonic Immigrant Bank of New York city bearing dates of June 29, 1921, and September 16, 1920, respectively. There was evidence in the form of a letter of appellant, dated December 1, 1920, to George Vucinich, showing that appellant was sending a draft at that time for $500 to be changed into dinars (a Jugo-Slavian monetary unit) for profit on expected rise in value. Appellant testified that the receipts were for moneys he sent

George Vucinich for support of the minors. The record fails to reveal any substantial evidence in support of respondents' claim that these moneys, of entirely different amounts and sent at other dates, were sent on personal account for the purchase of dinars. In rejecting them the court erred.

This leaves for determination the fourth specification, relating to the surcharge of $7,715.16. Appellant's contention is twofold: First, that the evidence is insufficient to support the finding that that amount of cash came into his hands as guardian, and, second, that the probate court was without jurisdiction to determine title thereto. The evidence is quite sufficient to sustain the finding that this amount of money was delivered by George Vucinich to appellant before the former left for Jugo-Slavia, and that it was money which had come from the estate of the deceased father of these minors.

[5-7] The superior court sitting in probate has jurisdiction to determine as against an executor the amount of money or property of the estate that has come into his hands, for the purpose of charging him therewith, and in determining that question to determine all issues necessarily incidental thereto. The power to determine as against the executor what money or other property belonging to the estate has come into his hands is implied in the power to settle his accounts and determine what remains in his hands to be distributed. Estate of Burdick, 112 Cal. 387, 44 P. 734; Stevens v. Superior Court, 155 Cal. 148, 99 P. 512. This power, however, is limited, in cases where title thereto is in controversy, to those where the executor or other personal representative claims the property in his individual capacity. Estate of Kelpsch, 203 Cal. 613, 265 P. 214; Bauer v. Bauer, 201 Cal. 267, 256 P. 820; Estate of Roach, 208 Cal. 394, 281 P. 607. It is undoubtedly the rule that the superior court sitting in probate is without jurisdiction to try the question of title to property as between a representative of the estate and strangers to the estate. Ex parte Casey, 71 Cal. 269, 12 P. 118; Estate of Haas, 97 Cal. 232, 31 P. 893, 32 P. 327. It will be readily noted from these citations that the line of demarcation between jurisdiction and nonjurisdiction of the probate court to determine what money or property, title to which is disputed, belongs to the estate, is determined by the status of the claimant. If it is claimed by the executor in his individual capacity, the probate court has power to consider and determine the validity of that claim. But if claimed by or on behalf of a stranger to the estate, the probate court has no jurisdiction to determine the controversy. It appears obvious that the foregoing rules affecting proceedings on accounts of executors and administrators of estates of decedents also apply to those of guardians of estates of minors. This is made manifest by the terms of section 1606 of the Probate Code, wherein it is provided that "when not otherwise specially prescribed in this division [guardian and ward], practice and procedure and the making and entry of orders under this division shall be governed by the provisions of division III of this code [Administrator of Estate of Decedents], so far as they are applicable."

[8] To all rules, however, there arise exceptions to its literal application, by reason of some basic fact upon which the rule is founded being absent. Herein it appears that before the probate court is ousted of jurisdiction to determine what money or property belonging to the estate has come to the possession of the guardian, it must appear that there exists in fact an actual and serious question as to whether the property belongs to the estate or some stranger thereto. In short, the claim, if asserted by the guardian on behalf of a third person, must appear to be a bona fide claim, not one asserted and adopted by the guardian as a means to escape liability to account for such property. In the case of In re Burdick's Estate, supra, 112 Cal. 387, 44 P. 734, cited by respondents, the court said: "Still, since the probate court has no jurisdiction to determine the rights of those claiming adversely to the estate, if serious questions upon such claims arise, the duty of the court might be to delay the final decree until such claims can be determined in another forum. Where there is in the hands of the executor money which the executor claims does not belong to the estate, he should himself take steps to test the right, if serious question exists; and, if he is improperly charged, his remedy is to appeal from the decree settling his final account. I know of no other way in which it can be reached." The effect of the foregoing decision respecting duty of the court upon ascertaining the seriousness of the claim, is considerably altered by the language of the court in the later case of Estate of King, 199 Cal. 113, 248 P. 519, 520, wherein a stranger made claim to part of an estate at time of distribution. The court said: "That the probate court has no jurisdiction to determine adverse claims to the properties of an estate in course of administration before it when asserted by a stranger to said estate has been fully determined in

numerous decisions by this court. * * * This being so, the administratrix of said estate had cast upon her no duty to take any action whatever upon the asserted right of the appellant to have delivered over to her the properties of said estate, and it follows that her failure to take such action in no way impeded the right of said administratrix when said estate was otherwise in a condition for distribution to present her petition for the distribution thereof."

[9] At the hearing on appellant's final account, respondent, as new guardian of the minors, filed written objections thereto and sought to have the account surcharged with the amount of cash that George Vucinich had left with appellant and which the court later found to be in the sum of $7,715.16. At the close of the hearing, the court was clearly justified in surcharging appellant's account. There was no proof of any claim to the money in question being asserted by George Vucinich in his lifetime and covering a period of twelve years from the time he left the money with appellant, nor any proof that his widow or heirs or any personal representative had ever asserted any claim thereto. The sole source of any such claim was the asseverations of appellant, which, in the light of his admissions by words of mouth and by letter, could not be reasonably deemed a serious claim or a claim of sufficient weight and verity to oust the jurisdiction of the probate court to determine whether this property belonged to the estate. If claims of such character as were made herein were adjudged sufficient to render the probate court powerless to decide them, the doors would be open to fraud to be practiced upon the beneficiaries of such estates. We think the lower court, sitting in probate, had power to determine the claim asserted by appellant and to surcharge his account.

[10] There is no merit in appellant's final contention that the pleadings herein are insufficient to put in issue the title to the surcharged moneys. No demurrer or objections to the form or substance of the written objections as filed were presented or urged at the trial, which proceeded on the theory that such an issue was before the court, and the point must be deemed waived by appellant (Estate of Randall, 188 Cal. 329, 205 P. 118) and may not be raised for the first time on appeal (Estate of Marre, 127 Cal. 128, 59 P. 385). Furthermore, the objection as filed clearly stated the contention of the objectors, and called to the court's attention a matter which it was under duty to carefully scrutinize and, as we have hereinabove decided, to determine by its order. This the lower court did, and its decision thereon finds ample support in the evidence.

The court below is directed to credit the guardian's account with the sum of $2,245.31 in accordance with this opinion, and, as so modified and corrected, it is affirmed without costs to appellant.

We concur: STEPHENS, P. J.; DESMOND, J.

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1 Cal.App.2d 671

KLEVESAHL v. BYINGTON et al.

Civ. 8838.

District Court of Appeal, First District,
Division 1, California.
Oct. 31, 1934.

Hearing Denied by Supreme Court
Dec. 27, 1934.

1. Municipal corporations 🔑184(2)

Civil service commission has exclusive power in determining qualification of one seeking appointment as policeman, and board of police commissioners has no right to pass on qualification nor review civil service commission's decision thereon (St. 1899, p. 326, art. 8, c. 1, § 3; St. 1913, p. 1613, art. 13, § 9; St. 1899, p. 352, art. 13, § 10).

2. Municipal corporations 🔑184(2)

Order of board of police commissioners finding party seeking appointment as policeman of bad character for honesty and sobriety and refusing to appoint him for that reason *held* nullity (St. 1899, p. 326, art. 8, c. 1, § 3; St. 1913, p. 1613, art. 13, § 9; St. 1899, p. 352, art. 13, § 10).

3. Municipal corporations 🔑184(2)

Civil service commission *held* authorized to appoint chief of police to make investigation as to "good moral character" of one seeking appointment as policeman and to make report to commission (St. 1913, p. 1612, art. 13, § 5).

> "Good moral character" includes all elements essential to make up such character, among which are honesty and sobriety.
>
> [Ed. Note.—For other definitions of "Good Moral Character," see Words & Phrases.]

4. Municipal corporations 🔑184(2)

Civil service commission could not delegate duty of determining moral character of one seeking appointment as policeman (St. 1899, p. 351, art. 13, § 7).

5. Municipal corporations 🔑184(2)

Action of civil service commission in determining applicant eligible for appointment as policeman "subject to moral character investigation to be made by chief of police" did not show illegal delegation of power but merely lawful employment of chief of police to gather information for commission's use in discharging its duty (St. 1899, p. 351, art. 13, § 7).

6. Evidence 🔑83(2)

Unqualified certification of respondent to board of police commissioners as eligible for appointment as policeman created presumption that civil service commission found respondent to be of good moral character (St. 1913, p. 1613, art. 13, § 9).

7. Mandamus 🔑75

Determination of question whether one seeking appointment as policeman was of good moral character was not ministerial act but required exercise of discretion by civil service commission, and therefore writ of mandate could not be employed to compel commission to exercise discretion in particular way (St. 1913, p. 1613, art. 13, § 9).

8. Mandamus 🔑72

Generally, writ of mandate may not be employed to compel subordinate board or commission possessing discretionary power to act in particular way.

9. Mandamus 🔑72

If facts as admitted or proved are susceptible of but one construction or conclusion, subordinate board or commission may be compelled by writ of mandate to act in accordance with facts as admitted or established.

10. Mandamus 🔑168(2)

Party seeking writ of mandate to compel civil service commission to certify petitioner to board of police commissioners as eligible for appointment as policeman had burden of proving that he possessed good moral character (St. 1899, p. 326, art. 8, c. 1, § 3; St. 1913, p. 1613, art. 13, § 9; St. 1899, p. 352, art. 13, § 10).

11. Municipal corporations 🔑184(2)

Evidence sustained finding of civil service commission that party seeking appointment as policeman was lacking in good moral character (St. 1899, p. 326, art. 8, c. 1, § 3; St. 1913, p. 1613, art. 13, § 9; St. 1899, p. 352, art. 13, § 10).

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Mandamus proceeding by Millard J. Klevesahl against Lewis F. Byington and others, as members of and constituting the Civil Service Commission of the City and County of San Francisco, and others. From an adverse judgment, defendants appeal.

Reversed.

John J. O'Toole, City Atty., and Edmond P. Bergerot, Asst. City Atty., both of San Francisco (E. H. Zion, of Modesto, and John R. Golden, Asst. Dist. Atty., of San Francisco, of counsel), for appellants.

Walter H. Duane, Joseph T. Curley, and Marvin C. Hix, all of San Francisco, for respondent.

GRAY, Justice pro tem.

The civil service commission (hereinafter called the commission) and the board of police commissioners (hereinafter called the board) of the city and county of San Francisco, appeal from a judgment directing the issuance of a peremptory writ of mandate, commanding the commission to certify respondent to the board, as eligible for appointment as a policeman, and the board to make such appointment. Except on the issue of respondent's character, the evidence raises no conflict of fact and so this appeal principally requires the interpretation of certain provisions of the former charter of 1899, as amended (St. 1899, p. 241, as amended).

On September 25, 1928, the commission adopted, "subject to moral character investigation to be made by the chief of police," a list or register of persons, eligible to appointment as policemen, which contained respondent's name. Reports, made in October, 1928, to the chief by officers requested to make such investigation, disclosed (1) that, in 1919, respondent had been arrested for robbery, declared a ward of the juvenile court, and released upon probation, which was vacated after twenty months; (2) that, in 1923, he had been arrested on the charge, subsequently dismissed in the police court, of possessing liquor in violation of the State Prohibition Enforcement Act (St. 1921, p. 79); and (3) that, in 1927, he had been tried for a violation of section 112 of the California Vehicle Act (St. 1923, p. 553), and after the jury disagreed, the charge had been dismissed. On July 22, 1929, the commission certified his name, to the board, as eligible for appointment. The board, on August 5, 1929, held a hearing at which the police records of the above arrests and the testimony taken in the juvenile proceedings and given by respondent in the trial of his accomplice in the robbery were introduced. Respondent introduced letters from three former employers and the pastor of his parish vouching for his good character and recommending his appointment. The business agent of his union, two former employees, and a family friend each testified to his good character over a period of ten years. Respondent, as a witness, claimed that he had been exonerated of the robbery, denied any knowledge of it, and stated that the third charge had been dismissed after the jury disagreed. The board, by a resolution passed on August 12, 1929, found respondent to be ineligible because of bad character for honesty and sobriety, refused to appoint him, and requested the commission to remove his name from the eligible list.

After considering the matter at several meetings, the commission, on November 13, 1929, submitted the request but reached no decision until after the appointment of two new members. Further consideration of the request was given by the commission, as constituted after the appointments, at its meeting of January 21, 1931, at which the written evidence, presented to the board, was introduced. In addition, an officer testified to respondent's second arrest in a place described by another officer as a "bootlegging flat," and three officers swore that respondent was intoxicated when his automobile collided with a police car, as charged in the third arrest. At a hearing held on February 25, 1931, the same business agent and three new witnesses each testified to respondent's good character for the prior ten years. Respondent also explained that he had been drinking when arrested for robbery; denied that he was intoxicated at the time of the collision, which he claimed was caused by skidding due to rain; and denied the place where he was arrested the second time was a "bootlegging flat" and stated that he occasionally visited its owner to play cards and drink beer. On May 27, 1931, the commission canceled respondent's certification and removed his name from the list of eligibles. Thereafter respondent instituted this proceeding in mandamus and, after a trial, in which the records of the commission and the evidence adduced before it were introduced, recovered judgment.

[1, 2] At all times since the adoption of the charter, article 8, c. 1, § 3 (St. 1899, p. 326), under whose purported authority the board acted, has read, in part, as follows: "No person shall become a member of the department unless he shall be * * * of good character for honesty and sobriety. * * *" Neither here nor elsewhere does the charter expressly empower the board to determine the existence or nonexistence of this qualification to appointment. Article 13, § 9, approved March 28, 1913 (St. 1913, p. 1613), provides that "the commission shall not certify the name of any person who in the judgment of the commission is not of good moral character; * * * and having certified such person shall cancel such certification; and the commission shall remove the name of any such person from all civil service registers." Good moral character includes all elements essential to make up such character, among which are honesty and sobriety. In re O———, 73 Wis. 602, 42 N. W. 221. Any construction of both sections which would grant to the board and the commission equal power to pass upon the same qualification would lead to useless duplication in case of their agreement and hopeless confusion in case of their disagreement. Any doubt of the commission's exclusive power in the matter of qualification is removed by consideration of article 13, § 10 (St. 1899, p. 352), which requires the board to appoint from the list certified by the commission. The board has no right to pass upon a matter of qualification whose determination is confided to the commission, nor to review the commission's decision thereon. Pratt v. Rosenthal, 181 Cal. 158, 183 P. 542. Since the board lacked power to pass upon respondent's character, its order, finding him of bad character for honesty and sobriety and refusing to appoint him for that reason, was a nullity.

[3-6] The commission adopted the eligible list with the proviso that it was "subject to moral character investigation by the chief of police." Section 5 of article 13 (St. 1899, p. 351, as amended by St. 1913, p. 1612) seems sufficiently broad so as to authorize the commission to designate the chief of police to make such investigation and report the same to it. Even in absence of such express authority, the commission would have implied power to so employ him. 43 C. J. 512. Section 7 of the same article (St. 1899, p. 351), however, imposed the duty of determining respondent's moral character, from such report or otherwise, upon the commission. The performance of this duty it could not delegate. 21 Cal. Jur. 881. But the wording of the proviso shows no illegal delegation of power, but merely the lawful employment of the chief of police to gather information for the use of the commission in discharging its duty. From its unqualified certification of respondent to the board, it must be presumed that the commis-

sion, in obedience to the mandate contained in said section 9, found respondent to be of good moral character. 21 Cal. Jur. 898.

[7-9] The change in the members of the commission is immaterial since it was a continuing body. 18 Cal. Jur. 891. Unless the charter authorized such action, the commission could not cancel respondent's certification and remove his name from the eligible list. Cook v. Civil Service Commission, 160 Cal. 598, 117 P. 662. On the other hand, if the charter granted such power, the commission had the authority to make its order of May 27, 1931. Mann v. Tracy, 185 Cal. 272, 196 P. 484; Uhte v. Rosenthal, 37 Cal. App. 519, 174 P. 83. Such grant of power is found in the third sentence of said section 9, which provides that the commission shall cancel the certification of a person whom it had previously determined to be of good moral character, upon subsequently finding him to be otherwise. Since the same sentence also expressly provides that the person certified shall "in the judgment of the Commission" be of good moral character, the commission is invested with discretion in making its determination. Stanley-Taylor Co. v. Board of Supervisors, 135 Cal. 486, 67 P. 783. The determination of respondent's character necessarily required an examination of evidence and a decision of law and fact and therefore was not ministerial. 38 C. J. 598. It is the general rule that the writ of mandate may not be employed to compel a subordinate board or commission possessing discretionary power to act in a particular way. The court may compel it to act, but it may not substitute its discretion for the discretion of the board or commission. An important exception to the rule, however, is that if the facts as admitted or proved be susceptible of but one construction or conclusion, the right to the writ becomes a matter of law and the board or commission may be compelled to act in accordance with the facts as admitted or established. Bank of Italy v. Johnson, 200 Cal. 1, 251 P. 784.

[10, 11] The burden of proving that he possessed a good moral character rested upon respondent. In re Wells, 174 Cal. 467, 163 P. 657; Spears v. State Bar, 211 Cal. 183, 294 P. 697, 72 A. L. R. 923; United States v. Leles (D. C.) 236 F. 784; United States v. Wexler (D. C.) 8 F.(2d) 880. The suspension of criminal proceedings as to the first charge and the dismissals of the other two charges did not conclusively establish respondent's good moral character, but the commission could investigate the facts relative to such charges and find therefrom respondent's moral character. In re Wells, supra; Spears v. State Bar, supra. His admission, before the juvenile court, of the truth of complainant's testimony that he was present and, by threats, participated in the taking of complainant's watch and money by an accomplice sufficiently established his guilt of robbery. Innocence of the crime was not shown by his testimony before that court that the accomplice actually took the property and never divided it with him, although he partook of liquor purchased therewith. His evidence, given at the trial of the accomplice in which he denied that any robbery had occurred, claimed that the victim voluntarily gave up his property, and excused his inability to remember details because of intoxication, compelled an inference of untruthfulness. The testimony of the three officers, before the commission, that he was intoxicated at the time of the collision, was sufficient to establish his guilt of the third offense. His denial of intoxication and explanation of the cause of the collision merely raised a conflict, which the commission was empowered to decide. His statement to the commission that he visited a place, proved by police testimony to be a "bootlegging flat," for the purpose of drinking and card-playing could well have influenced the commission's decision. This evidence together with testimony of intoxication in the other two offenses was a sufficient basis for finding that respondent lacked sobriety. The weight and effect to be given to the letters of recommendation and the character testimony were matters for the commission's consideration. At most such evidence merely raised a conflict of fact and did not necessarily compel a finding contrary to that made by the commission. His persistent denial of culpability of any of the offenses, in the face of his admissions and contradictory evidence, may well have convinced the commission that he lacked contrition, which is essential to true reformation and frankness, which is a prime requisite of good moral character. It cannot be said therefore that the entire evidence leads to the single conclusion that respondent was of good moral character.

The judgment is reversed.

We concur: TYLER, P. J.; CASHIN, J.

2 Cal.App.2d 32

FAITH et al. v. MORELLO et al.

Civ. 1300.

District Court of Appeal, Fourth District, California.

November 5, 1934.

1. Contracts 🔑147(3).

Intent of parties to contract must be ascertained by consideration of instrument in its entirety.

2. Vendor and purchaser 🔑77.

Contract for sale of vineyard providing for purchasers' payment of interest and principal installments on outstanding incumbrance, with provision for extension in event of insufficiency of net income from property to make "payments herein required to be made by buyer," *held* to require payments on incumbrance only to extent of net income from property.

◆

Appeal from Superior Court, Fresno County; H. S. Schaffer, Judge.

Action by Harry Faith and another against E. Morello and another. Judgment for defendants, and plaintiffs appeal.

Judgment reversed, with directions.

Prior opinion, 33 P.(2d) 45.

W. H. Stammer and Percy C. Church, both of Fresno, for appellants.

Ray W. Hays, of Fresno, for respondents.

JENNINGS, Justice.

A rehearing was granted in this case in order to give further consideration to certain contentions advanced by appellants. Upon such reconsideration, we are of the opinion that the contentions of appellants are meritorious and should to some extent be sustained. Appellants do not complain that this court in its prior decision incorrectly disposed of the principal question which is presented on this appeal, and, since we now entertain the conviction that our opinion heretofore rendered made proper disposition of such question, we therefore adopt so much of said opinion as is decisive of said question. It is as follows:

This is an appeal by plaintiffs from a judgment rendered in favor of defendants by the superior court of Fresno county. The action was instituted by plaintiffs for the purpose of obtaining a decree compelling specific performance by defendants of a certain contract entered into between plaintiffs and defendants whereby defendants had agreed to sell and plaintiffs had agreed to buy a certain parcel of land for a stipulated sum of money. The complaint alleged that upon execution of the contract plaintiffs had entered into possession of the property and had fully performed their part of the agreement, that defendants had wrongfully secured possession of the property and refused to surrender possession to plaintiffs who were entitled thereto. The defendants filed an answer and cross-complaint wherein they admitted execution of the contract and that they had retaken possession of the land, but alleged that they had done so for the reason that plaintiffs had violated the terms of the contract of sale. The pleading concluded with the prayer that the title of defendants to the property be quieted as against the claims of plaintiffs.

It is conceded that there was no material conflict in the evidence which was submitted during the trial of the action. The main question presented on this appeal relates to the construction by the trial court of a certain provision of the aforesaid contract. It is the contention of appellants that the trial court incorrectly interpreted this provision. Consideration of this contention necessitates a brief statement of the facts which were developed by the evidence.

On August 4, 1930, respondent Paradise Vineyards, Inc., was the owner of a tract of land in Fresno county comprising approximately 320 acres. On this date the said corporation entered into a written contract with appellants whereby it agreed to sell and appellants agreed to purchase the property for the sum of $90,000, of which amount the sum of $2,500 was paid in cash on the execution of the agreement and a further sum of $22,500 was to be paid from the proceeds to be derived from the sale of grapes that were then being grown on the land. The balance of the purchase price, which amounted to the sum of $65,000, was to be paid in specified annual instalments. The contract recited that "both parties hereto understand that said property is subject to" a lien of the Bank of Italy in the sum of $46,250. It is also evident from the terms of the contract that the lien of the bank was one which existed by virtue of a trust deed or mortgage executed by respondent and that by the terms thereof the respondent was obligated each year to make a payment of $7,500 on account of the principal of the indebtedness to the bank and also to make semiannual payments of interest due on the unpaid balance of the principal. The contract between the respondent corporation and appellants contained the following provision which it is contended the trial court improperly construed: "In the event the income from said real property, due to frost injury, market conditions, or other conditions beyond the control of buyers, is so reduced that it is insufficient, after deducting operating costs, to make the payments herein required to be made by buyers, then should buyers and both of them be unable financially to make said payments from funds or other resources under their control, seller agrees that they will for such year consent to an extension of the payment accruing for such year to the December first following, provided that the actual net income from said real property is applied towards the payment of taxes first, the payments of interest on the first incumbrance, secondly, and thirdly towards the payment of any installments on said first incumbrance accruing during said year, and sellers expressly consent that buyers may procure from the holder of said incumbrance an extension of the installment payment accruing in such year after the application of the net proceeds from operations of said real property have been applied as herein required. Should, however, owing to insufficient net income or insufficient resources of buyers, exclusive of income from said real property, be insufficient to prevent a foreclosure of the incumbrance on said real property and a foreclosure occur, buyer shall in that event have no cause of action or claim against seller by reason of the loss of his investment in said real property. In this connection buyers agree that they shall keep careful record of all operating expenses for each year, which record and expenses shall be furnished to seller in the event an extension is required under this paragraph."

The court found that after the execution of the contract appellants went into possession of the property and performed all terms, covenants, and conditions of the agreement which they were required to perform except that they failed to make the payments of principal and interest to the Bank of Italy which were due on December 1, 1931. The court also found that during the year 1931 the crops which were produced on the land were approximately one-third of the normal crops, due to excessive heat and other conditions beyond the control of appellants and that for this reason the proceeds from the sale of crops were so reduced that they were insufficient to pay the operating expenses of the property and that appellants were not nor was either of them financially able to make the payments required of them by the contract or to the bank and that there was no actual net income from the property during the year 1931. The court, however, further specifically found that by the terms of the contract appellants were bound to make the payments of principal and interest due the Bank of Italy on December 1, 1931, even though the net income from the property during the year 1931 due to frost injury, market conditions, or other conditions beyond the control of appellants was so reduced that it was insufficient to make the payments required to be made by appellants and even though appellants were and each of them was financially unable to make such payments from funds under their control or the control of either of them and even though there was no actual net income from the property. In other words, the court so interpreted the contract that appellants were required to make the annual payments due to the bank and so construed the agreement that the obligation to make such payments was not included within the language of the provision by which the respondent corporation expressly agreed to extend for one year the payments which were specified to be made to it by appellants in the event that the net income from the property should prove insufficient to make such payments and appellants were financially unable to make the payments from their private funds.

[1, 2] The language of the so-called extension clause of the contract hereinabove quoted appears to lend support to the contention of appellants. It is therein stated that if it should develop that the net income from the property, by reason of specified conditions, including the very general contingency of the occurrence of conditions beyond the control of appellants, should be so reduced as to make it insufficient to make the payments which appellants were required to make by the terms of the contract and if appellants should be financially unable to make these payments from funds under their control, the respondent corporation agreed that it would "for such year consent to an extention of the payment accruing for such year to the December first following." The court found and there is no contention that there was not ample evidence to support its finding that the very situation mentioned in the extension clause did come into existence during the year 1931. The evidence showed that this year was an unusually dry year and that the quantity of crops produced was slightly more than one-third of that which had been produced during the preceding year

and that consequently there was no net income derived from the land, but that, on the contrary, appellants paid more than $6,000 from their private funds to supply a deficiency in the amount required to pay operating expenses. The undisputed evidence also showed that neither appellants jointly were, nor either of them severally was, able to make the payments required of them by the terms of the contract. This situation, which was exactly the one which was evidently anticipated might occur, would seem to fall within the express terms of the aforesaid clause of the contract and to require the respondent corporation to grant to appellants an extension of one year in the payment of the installment which was due from appellants on December 1, 1931.

Furthermore, it is a familiar and well-established rule that, in the interpretation of written agreements, the essential element of the intent of the parties to a contract is to be discovered by a consideration of the instrument in its entirety rather than by an examination of detached portions of the instrument. Hunt v. United Bank & Trust Co., 210 Cal. 108, 291 P. 184; Nakagawa v. Okamoto, 164 Cal. 718, 130 P. 707; Mente & Co., Inc., v. Fresno Compress & Warehouse Co., 113 Cal. App. 325, 298 P. 126; 6 Cal. Jur. 259. The application of this rule lends further support to the contention advanced by appellants. Analysis of the lengthy and complicated contract which was entered into between the respondent corporation and appellants shows that on the date of the agreement the corporation was the owner of the land; that the property was subject to the lien of a trust deed or first mortgage which had been executed by the corporation to secure the payment of an indebtedness owing from the corporation to the Bank of Italy; that the corporation was obligated on December 1st of each year to make a payment of $7,500 on the principal of the indebtedness and on June 1st and December 1st of each year to make semiannual payments of interest on the balance of such indebtedness; that on the date of the agreement the principal of this indebtedness was $46,250. As above noted, appellants agreed to purchase the property for the sum of $90,000, of which they paid $2,500 in cash and agreed to make a further payment of $22,500 from the proceeds to be derived from the sale of grapes which were then growing on the land. The balance of the purchase price, amounting to $65,000, was to be paid as follows: "$7500.00 on or before December 1, 1931; $7500.00 on or before December 1, 1932; $7500.00 on or before December 1, 1933; $7500.00 on or before December 1, 1934; $6000.00 on or before December 1, 1935; $6000.00 on or before December 1, 1936; $5000.00 on or before December 1, 1937; and $5000.00 on or before the first day of December of each succeeding year until the entire balance of the purchase price hereunder shall have been paid." Deferred payments were to draw interest at the rate of 7 per cent. per annum, payable on December 1 of each year. It was expressly provided that appellants were required on the 1st day of December and the 1st day of June next succeeding the date of the agreement to make the semiannual payments of interest which should be due on those dates on the balance of the principal indebtedness due the Bank of Italy, "but aside from the payment of the interest on this incumbrance which must be made semi-annually, buyers' interest shall be paid annually on the first day of December of each year." The buyers were expressly accorded the privilege of making "all payments accruing hereunder to the Bank of Italy directly, in lieu of making payments to seller, and payments so made to the Bank of Italy shall as and when made be credited as payments upon this contract." It was then further provided that if the interest on the unpaid balance of the indebtedness due the Bank of Italy were paid "as it matures each year by seller, in accordance herewith, that the balance of the accruing interest on this contract may be added to the principal until such time as a flat loan can be secured on said real property from the Bank of Italy or elsewhere, and that from the time the flat loan is secured buyer shall thereafter, on the 1st of December of each year, pay all accruing interest for the previous year under this contract." The next paragraph, after reciting that the property is subject to the aforementioned lien of the Bank of Italy in the amount heretofore specified, contains an express agreement by the seller to make payment on or before December 1, 1930, of the installment due on the principal of the indebtedness due the Bank of Italy and of the interest due the bank on said date. Then follows a statement to which both parties to the contract expressed their agreement that, if the Bank of Italy could be induced to accept a less sum than the amount of the $7,500 installment which would be due on the principal of the indebtedness on December 1, 1930, the amount thus retained should be used for drilling an additional well and installing a pump provided that such money, together with funds "available from buyer," would be sufficient for such purpose. The succeeding paragraph contains a covenant of mutual agreement that both parties will cooperate in attempting to secure from the Bank of Italy or from any other lender a flat loan on the property for a term of three years at an interest rate not to exceed 7 per cent. per annum and that the parties will join in the execution of whatever instruments may be required for the securing of such a loan. The next paragraph contains the so-called extension agreement of the seller as hereinbefore quoted in full. The paragraph following contains an express covenant by appellants that, after the payment of the additional sum of $22,500 has been made from the net proceeds of the 1930 crop, whatever balance of such net proceeds remains will be deposited in a separate bank account to be used in taking care of the property for the year 1931, "including the payment of taxes," and appellants declare themselves trustees of the proceeds of the crops for the purpose of making the payments required. It is further specified in this paragraph that appellants agree that, prior to the commencement of operations in the year 1931, they will convince the seller and the bank that they have sufficient resources available to farm and take care of the land properly during the year 1931, "including payments of taxes and interest to the Bank of Italy." A number of additional paragraphs follow which contain provisions that are not particularly helpful in disclosing the intent of the parties. The final paragraph contains the usual provision that if appellants as buyers fail to make any payment required to be made by them or to perform any of the terms or conditions required to be performed by them, the seller, respondent corporation, will be authorized, at its election, to cancel and terminate the contract, in which event appellants agree to deliver possession of the property to the respondent corporation and all payments theretofore made by appellants under the contract shall be retained by the corporation as a reasonable rental of the property.

From the above-described complicated and not altogether unambiguous provisions of the contract, certain deductions respecting the intention of the parties may reasonably be drawn. In the first place it appears evident that the parties intended and expected that whatever payments that were to be made under the contract, other than the initial payment of $2,500, would be derived from the net proceeds of crops that would be grown on the land. In the second place, it is obvious that the parties recognized the existence of a lien which had been placed upon the property by the respondent corporation and a definite obligation of the seller to make an annual payment of the sum of $7,500 on the principal of the indebtedness which the lien secured and two semiannual payments of interest on the unpaid balance of such indebtedness. In the third place, it is apparent that appellants were expressly permitted to deal directly with the owner and holder of this lien and to make to such owner any payments required to be made by the contract. In the fourth place, it is evident that the respondent corporation was primarily interested in securing from appellants, each year, sufficient money to meet the annual payment of the installment due on the principal and the semiannual interest charges.

Taking specifically the language of the extension clause of the contract whose proper interpretation presents the legal problem which is here involved, we find that the respondent corporation expressly agreed that, if the net income from the property due to certain stated conditions, including the very general contingency of "other conditions beyond the control of buyers," should be insufficient to enable the buyers to make the payments required of them and if the buyers should further be financially unable to make such payments from their private funds or resources, it would consent to an extension of the payment accruing for such year to the December first following. What were these payments which by the terms of the contract appellants were required to make during the year 1931? They were first a payment of $7,500 on the $65,000 balance and, second, a payment of interest on this balance at the rate of 7 per cent. for one year. Both of these payments were to be made on December 1, 1931. If these payments were not made, due to insufficiency of net income from the property caused by any of the specified conditions, the respondent corporation became obligated to grant an extension. This, however, had nothing to do with the corporation's obligation to make payments on the principal and interest of the indebtedness which it owed to the third party. That obligation was separate and distinct from the obligations of appellants as defined by the contract. However, the existence of the obligation of the respondent corporation was specifically recognized, and this respondent hoped and expected that appellants would be able to make the payments required by the contract and appellants were expressly granted the option to make payments direct to the third party. Appellants were expressly required by the proviso which is contained in the extension clause to apply whatever net income that should be derived from the property during the year 1931 to the payment of certain specified charges. They were required, first, to pay the taxes assessed against the property; second, to pay the interest on the "first incumbrance"; and, third, to pay any installments "on said first incumbrance accruing during the year." With respect to the application of the net income to the payment of any installments of the principal indebtedness secured by the so-called "first incumbrance" there is a modification consisting of an express consent by the respondent corporation that appellants might procure from the holder of such incumbrance an extension of the installment payment which was due from the corporation after the net proceeds from the property had been applied to the payment of taxes and interest on such first incumbrance. What would happen if the net income from the property were insufficient and appellants were unable from their private funds to make the payments required of them and the holder of the first incumbrance should bring an action of foreclosure? This very contingency was evidently considered, for the last sentence of the extension clause expressly provides that in such event "buyer shall have no cause of action or claim against seller by reason of the loss of his investment in said real property."

In support of the trial court's interpretation of the so-called extension clause, respondents rely on certain language which appears in another part of the contract and upon certain evidence which was produced whose effect was, it is urged, to show a practical interpretation of the extension clause by appellants which amounted to the same interpretation placed upon the extension clause by the trial court.

The language of the contract upon which respondents thus rely is as follows: "Buyers must pay interest semi-annually on June 1st and December 1st, next succeeding, to the amount of interest accruing on the present incumbrance now held by the Bank of Italy, or on any incumbrance or substitution thereof that may be placed thereon, but aside from the payment of the interest on this incumbrance which must be made semi-annually, buyers' interest shall be paid annually on the first day of December of each year." It is contended that the foregoing language clearly imposed upon appellants the definite duty to make the semiannual interest payments which were required to be made on the unpaid balance of the principal indebtedness secured by the lien of the so-called first incumbrance and indicated that the payment of interest charges on the first incumbrance was not covered by the language of the extension clause.

However, if it be assumed that the above-quoted language imposed upon appellants the obligation of paying the semiannual interest charges on the first incumbrance, it must be conceded that this duty was one that was created solely by the contract. No one has had the temerity to suggest that it came into existence in any other manner. Certainly it could not have been imposed by the terms of the trust deed or mortgage which represented the lien of what is so frequently called the "first incumbrance" in the contract. The first incumbrance was in existence when the contract between the parties to the present action was executed. It was placed upon the property either by the respondent corporation or by one of its predecessors in interest. It is nowhere suggested, nor does the record contain any evidence tending to show, that appellants were parties to the trust deed or mortgage which was owned by the Bank of Italy. Since the obligation to make the semiannual payments of interest charged on the first incumbrance was one that was imposed upon appellants solely by the terms of the contract, it would appear that it is clearly covered by the following language of the extension clause: "In the event the income from said real property * * * is so reduced that it is insufficient, after deducting operating costs, *to make the payments herein required to be made by buyers*" (italics ours). The intent of the respondent corporation that the payment of interest on the first incumbrance should be considered as an obligation imposed upon appellants by the contract is further indicated by the language of the proviso which appears in the extension clause wherein the promise of the respondent corporation to grant an extension is qualified by the condition that the actual net income from the property shall be applied, first, to the payment of taxes; second, to the payment of interest on the first incumbrance; and, third, to the payment of any instalments on the principal of the first incumbrance that have become due during the year.

The contention of respondents that there had been a practical interpretation of the contract by appellants which coincided with the trial court's interpretation is based upon certain evidence which was produced during the trial. It was shown that prior to June 1, 1931, appellants had negotiated directly with the Bank of Italy with respect to the payment of interest on the first incumbrance which would be due on June 1, 1931, and that as a result of these negotiations the bank, on May 28, 1931, accepted from appellants their promissory note for the sum of $1,582.29, representing the interest which would be due on the first incumbrance on June 1, 1931, payment of which note was secured by a chattel mortgage executed by appellants and likewise delivered to the bank. By this action in thus dealing directly with the bank and by thus paying the interest on the first incumbrance to the bank, it is argued that appellants themselves so construed the provisions of the contract as to indicate that they recognized that they were obligated to make the semiannual payments of interest on the first incumbrance and further recognized not only a distinct obligation to pay the interest but an obligation to pay the interest direct to the holder of the first incumbrance. The next step in this line of reasoning is that the recognition of an obligation to pay the interest direct to the third party amounted to a practical admission by appellants that all payments, both of interest and of installments of the principal of the first incumbrance, were required to be paid by them, not to the respondent corporation, but to the holder of the first incumbrance. The final step in this reasoning is that the trial court correctly interpreted the language of the extension clause in exact conformity with the practical interpretation placed upon it by appellants themselves.

There are two difficulties which prevent the acceptance of this reasoning. In the first place it does not take into account the fact that whatever obligation rested upon appellants to make any payments on the first incumbrance was an obligation which was created by the contract. These payments were therefore payments which were required by the contract to be made by the buyers (appellants) and as such were included within the very language of the extension clause. In the second place, the action of appellants in dealing directly with the holder of the first incumbrance cannot be construed as an admission by appellants of a distinct obligation thus to deal for the reason that appellants were expressly accorded the privilege of making all payments which should fall due under the terms of the contract directly to the Bank of Italy "in lieu of making payments to seller, and payments so made to the Bank of Italy shall as and when made be credited as payments upon this contract." In other words, appellants were given the option of making all payments required of them under the contract directly to the bank and their exercise of this option may not be construed as an admission by them that such payment so made is not included within the language of the extension clause.

It is therefore our opinion that the trial court incorrectly interpreted the extension clause of the contract and that its finding which expresses this improper interpretation is not justified.

The problem which remains for solution is whether or not the finding of the trial court that neither appellants were nor either of them was financially able to make the payments required to be made by them on December 1, 1931, from funds or resources under their control or under the control of either of them, is sufficiently supported by the evidence to require a reversal of the judgment, or whether this finding may be so modified in accordance with the evidence that an affirmance of the judgment may be ordered. In our prior opinion it was our conclusion that, although this finding was proper so far as it went, it required alteration and modification because it did not fully reflect the precise situation which was disclosed by the evidence. We therefore modified finding IV of the trial court's findings by incorporating the following sentence in lieu of the last sentence but one thereof: "Although Harry Faith and Melville Levy were not, nor was either of them, financially able to make the payments required of them on December 1, 1931, there should have been available for such payments from funds and resources under their control or under the control of one of them the sum of $1,948.39, and such sum would have been available if it had not been applied on expenditures that were not contemplated by the parties to the contract and which were not proper expenditures under the terms of the contract." The sentence in the court's finding which was replaced by the above-quoted sentence was as follows: "Harry Faith and Melville Levy were not, nor was either of them, able financially to make the payments due under the agreement or to the Bank of America from funds or other resources under their control, or the control of either of them." The reason for the modification of the finding by the incorporation of the former sentence in lieu of the latter was that examination of the record indicated that, although the evidence showed that neither Faith nor Levy were, nor either of them was, financially able to make the payment required of them on December 1, 1931, nevertheless it also appeared that there would have been available for application on such payment the sum of $1,-

948.39 if certain expenditures which were not contemplated by the parties to the contract and which were not properly chargeable against the receipts derived from the operation of the property had not been made. The above-mentioned amount of $1,948.39 was made up of four items, to wit: First, the sum of $568.51, which was the profit earned from the operation of the property during the year 1930 if appellants had not included in their statement of receipts and disbursements for this year as an item of expense the sum of $2,500, which was the amount of their initial cash payment under the contract; second, the sum of $850 paid to a receiver who was appointed in an action instituted by three persons who claimed that they were interested with appellants in the operation of the property as a joint adventure and who demanded an accounting and settlement of the business and that it be wound up and closed; third, the sum of $308.50 paid out by the receiver from funds received by him during his operation of the property as the unpaid balance due on a certain Ford automobile which was registered in the name of appellant Faith; fourth, the sum of $221.38, which was the final cash balance in the receiver's hands when the receivership was terminated. Although the evidence indicated that appellants expended from their own funds an amount in excess of $6,000, nevertheless, since by the terms of their contract they were compelled to exhaust their own resources before they would be entitled to the privilege of an extension, they would have had available for application on the payment due from them on December 1, 1931, the aforementioned sum of $1,948.39. It was therefore our conclusion that the judgment of the trial court which refused specific performance of the contract to appellants was correct and should be affirmed, although the court incorrectly interpreted the language of the extension clause of the contract as requiring appellants to make the payment due on December 1, 1931, even though no profit was derived from the operation of the property during the year 1931, and even though it appeared that neither appellants jointly were, nor either of them was then, financially able to make the payment from their or his private funds.

In their petition for a rehearing, appellants complain that the trial court's finding of financial inability to make the payment due from them on December 1, 1931, was supported by the evidence produced during the trial, and that the modification of this finding made by this court in its original opinion was therefore not justified. It is conceded that the inclusion by appellants of the initial cash payment of $2,500 as an item of disbursement in their written statement of receipts and disbursements for the year 1930 was improper, since the contract clearly provided that the balance of the payment of $25,000, which was to be made during the season of 1930, should be paid from profits derived from the operation of the property during this season. It is therefore granted that our original conclusion that appellants embarked upon the year 1931 with a balance of $568.51 was justified by the figures which appeared in the statement of receipts and disbursements for the season of 1930 furnished to respondents by appellants after the total amount of disbursements was reduced by the aforementioned amount of $2,500 representing the initial cash payment made under the contract. It is, however, pointed out that the statement of receipts and disbursements was not a statement of profit and loss, and that appellant Melville Levy testified during the trial of the action that the operation of the property during 1930 actually resulted in a loss because of the fact that there were charges for various supplies amounting to $7,000, which remained unpaid at the end of the season of 1930. This witness further testified that of this amount approximately $2,000 had been paid by appellants, leaving unpaid and owing from appellants the sum of $5,000. It is further observed that this testimony stands uncontradicted in the record. It is then urged that our original conclusion that appellants should have had available for application on the payment due under the contract December 1, 1931, the sum of $1,948.39 was incorrect, since the above-described uncontradicted evidence showed that appellants still owed an unpaid balance of $5,000 for supplies furnished to them during the season of 1930, and that, if the various items making up the sum of $1,948.39 had been available, it would have been the duty of appellants to have applied them as payments on their unpaid obligations incurred during the season of 1930.

An examination of the record has produced the conviction that the matters above outlined were regarded as being of minor importance during the trial of the action, and that they then received but slight attention. The present condition of the record is such that we feel we cannot now decide them with that certainty of just disposition which should always be present when a review purports to bring litigation to a complete and final termination. The matters to which reference has here been made should be thoroughly developed at a second trial of the action.

The judgment from which this appeal has been taken is therefore reversed.

We concur: BARNARD, P. J.; MARKS, J.

CASE et al. v. McCONNELL & FORRESTER et al. *

Civ. 8548.

District Court of Appeal, Second District, Division 2, California.
Nov. 5, 1934.

Rehearing Granted Dec. 1, 1934.

1. **Joint-stock companies and business trusts** 🔑15(1)

Beneficiaries under trust agreement involving sale of real estate *held* individually liable for commission earned by advertising and sales managers appointed by executive committee of trust, although trust agreement provided that beneficiaries could not be personally obligated, where neither advertising manager nor sales manager knew of limitations and rendered services in belief that executive committee had full authority to employ them.

2. **Joint-stock companies and business trusts** 🔑17

Executive committee of trust created for sale of real estate, which hired advertising manager and sales manager under actual authority of trust agreement, had ostensible authority to render trust beneficiaries liable for commissions earned by managers, where terms of trust agreement limiting beneficiaries' liability to assets of trust were not disclosed to managers and they relied on committees' authority (Civ. Code, § 2317).

3. **Joint-stock companies and business trusts** 🔑17

Bank holding land in trust *held* liable to sales and advertising manager of real estate subdivision for commissions on purchase price of lot paid to bank, where, at time purchase price was placed in bank, executive committee of trust had ordered bank to pay managers commissions as fast as selling prices of lots were collected.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by John R. Case, Jr., and another against McConnell & Forrester, copartners and others, and against the Bank of America National Trust & Savings Association. From a judgment for plaintiffs, the last-named defendants appeal.

Affirmed.

Freston & Files, of Los Angeles, for appellants.

Janeway, Beach & Hankey, of Los Angeles, for respondents.

SCOTT, Justice pro tem.

Plaintiffs recovered judgment for commissions earned by them in sale of certain lots in a real estate subdivision. Appellant bank held the land in trust for the purpose of assisting the parties in carrying out their project. The other four appellants were among the beneficiaries of the trust. The beneficiaries constituted themselves in effect a voluntary, unincorporated association known as "Monte Mar Vista Syndicate," and under the trust agreement they had possession of the land for the purpose of improvement and sale. By this same agreement they appointed appellant Forrester and defendant McConnell as selling agents and also as an "executive committee," and granted them an "irrevocable power of attorney to do any and all acts on behalf of the beneficiaries which they themselves could do," with the sole exception that they could not obligate beneficiaries personally but only as to trust assets. The executive committee in turn employed plaintiffs, Case as advertising manager and Brockett as sales manager, to sell the property.

Appellants contend that the judgment against the four who were beneficiaries should not have been against them personally but should be recoverable only out of trust property, by reason of the provisions in the trust agreement.

[1] The court found that: "Neither of the plaintiffs has ever read said Amended Declaration of Trust of date March 15, 1927 (in which these matters were set out), and neither of plaintiffs, prior to the filing of the answer in this action, knew of any limitation upon the authority of said W. R. McConnell and/or of said Fred W. Forrester, and plaintiffs rendered such services as were rendered by them during their said employment believing that said Fred W. Forrester and W. R. McConnell as such executive committee and exclusive

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 44 P.2d 414.

sales agents had full and unlimited authority to employ them respectively as advertising manager and sales manager for said trust and the beneficiaries thereof." The evidence is sufficient to support this finding.

It was admitted at the trial that "all the beneficiaries knew who the executive committee was," and that the latter were acting as their agents. It is apparent that it was within the scope of their employment for this executive committee to hire plaintiffs, and the latter knew that the executive committee were agents for the beneficiaries under the trust. Sales were made by plaintiffs, and were accepted by the beneficiaries and the bank. When the sales had been completed but the commissions were not paid, plaintiffs were told about a "pool" that was to be formed by the "syndicate"; i. e., an assessment which was to be levied upon the beneficiaries for the purpose of paying the commissions which had been earned. Having entered into their mutual relationship by virtue of the trust agreement, each beneficiary was liable for debts incurred during the period that he occupied such relationship and which were necessarily contracted for the purpose of carrying out the objects for which such trust was formed, except as to persons who dealt with them on the basis of agreement limiting their liability. Leake v. City of Venice, 50 Cal. App. 462, 195 P. 440.

[2] Plaintiffs having been employed by the executive committee acting as agents of the beneficiaries, appellants are precluded from asserting the undisclosed limitation on their agents' authority in defense of this action. Since their agents had actual authority to employ plaintiffs to sell the land and ostensible authority (Civ. Code, § 2317) to render appellants liable for the commissions they thus earned, appellants cannot accept the benefits of such sales and then seek by virtue of their agreement with the executive committee, which was not disclosed to plaintiffs, to avoid payment of the commissions earned. Fairbanks v. Crump, etc., Co., 108 Cal. App. 197, 291 P. 629, 292 P. 529. "The question of the authority of the agent must depend, so far as it involves the rights of innocent third persons who have relied thereon, upon the character bestowed, and not upon the instructions given. Or in other words, the principal is bound to third persons who have relied thereon in good faith, and in ignorance of any limitations or restrictions, by the apparent authority he has given to the agent, and not by the actual or express authority, where that differs from the apparent, and this, too, whether the agency be a general or a special one." Whitton v. Sullivan, 96 Cal. 480, 483, 31 P. 1115; Browning v. McNear, 158 Cal 525, 111 P. 541; Thomas v. Fursman, 39 Cal App. 278, 178 P. 870.

[3] Judgment against defendant bank was for the commission on sale of one lot. The lot had been sold for cash, and the purchase price was in the hands of the bank when the executive committee ordered it to pay plaintiffs their commissions as fast as the selling prices on said sales were respectively collected. The money was therefore held by the bank, subject to such order of the executive committee, and it was its duty to pay it over to plaintiffs. Upon its failure to do so, the trial court properly held it liable to plaintiffs for that amount.

No question is raised on this appeal as to misjoinder of either parties or causes of action.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

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1 Cal.App.2d 620

PEOPLE v. MYERS et al.

Cr. 174.

District Court of Appeal, Fourth District, California.

Oct. 26, 1934.

Hearing Denied by Supreme Court Nov. 22, 1934.

1. Indictment and Information 🔑87(3)

Information is sufficient if it can be understood therefrom that offense charged was committed at some time prior to filing thereof (Pen. Code, § 959, subd. 5).

2. Indictment and Information 🔑87(3)

Information for burglary *held* to charge public offense under statutes, although alleging that offense took place eight months after filing of information, where it appeared that error in dates was merely typographical; rule being that to accuse one of commission of a crime is to charge that it was committed before accusation (Pen. Code, §§ 951, 955; § 959, subd. 5).

3. Criminal law 🔑1186(4)

Error in information for burglary stating that offense charged was committed eight months subsequent to filing thereof *held* not prejudicial, where people's witness testified that offense was committed three months before filing of information, error was not mentioned in specifications, and motion for new trial was not in record and grounds therefor were not in minutes (Const. art. 6, § 4½).

4. Criminal law 🔑511(2)

Evidence corroborating accomplice must tend, at least slightly, to implicate defendant with commission of offense, and, although entitled to little weight standing alone, it should be more than mere suspicion.

5. Criminal law 🔑511(3)

Corroboration of accomplice need not be by direct evidence, it being sufficient if connection of accused with alleged crime may be inferred from corroborating evidence.

6. Criminal law 🔑1035(3), 1129(1), 1137(2)

Trial judge's remark, in jury's presence, that he thought that there was sufficient corroboration in case to go on, although improper, *held* not reversible error where accused, through his attorney, directly asked for remark, but did not assign it as error nor request that jury be instructed to disregard it.

◆

Appeal from Superior Court, Fresno County; Arthur Allyn, Judge.

Roy Myers and another were convicted of burglary in the first degree, and Roy Myers appeals.

Affirmed.

Roy Myers, in pro. per.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

MARKS, Justice.

Roy Myers and Scott Rackley were convicted of the crime of burglary in the first degree and have appealed from the judgment pronounced upon them. The appeal of Rackley has been dismissed, People v. Myers (Cal. App.) 36 P.(2d) 410, leaving that of Myers for our consideration.

Myers has appeared here in propria persona and presents the following grounds for a reversal of the judgment: (1) That the information does not charge a public offense; (2) that the evidence does not support the verdict and judgment; (3) prejudicial misconduct on the part of the trial judge.

The information which was filed on April 5, 1934, contains the following: "The District Attorney of the County of Fresno hereby accuses Roy Myers and Scott Rackley of a felony, to-wit: Burglary in that on or about the 20th day of December, 1934, in the County of Fresno, State of California, they entered a barn on the Milton G. Cooper Ranch, located on McCall Avenue near Washington Avenue, in said County of Fresno, State of California, with intent to commit theft therein."

Appellant maintains that as the date of the filing of the information was more than eight months before the crime was alleged to have been committed it "stated no offense for the commission of which the defendants could be tried, in that the day of the alleged commission of the offense was a day after the accusation was made; therefore no offense was charged." People v. Moody, 69 Cal. 184, 10 P. 392. We are cited to the following additional cases bearing upon this question: People v. Squires, 99 Cal. 327, 33 P. 1092, 1093; People v. Dinsmore, 102 Cal. 381, 36 P. 661, 662, and People v. Miller, 137 Cal. 642, 70 P. 735, 737.

People v. Moody, supra, is direct authority supporting the position of appellant. People v. Squires, supra, refers with approval to the rule announced in the Moody Case and adds, "To accuse one of the commission of a crime is to charge that it was committed prior to the accusation." In People v. Dinsmore, supra, it is said: "The information appears to have been filed October 15, 1892, while it charges the offense to have been committed October 28, 1892. It is entirely apparent that a mistake has occurred in the stating of one of these two dates, and this mistake might well have been corrected by the trial court by some appropriate proceeding; but we think no such irregularity is here presented as to be fatal to the case. The information alleged, in terms, that the acts charged were committed prior to the day of its filing, and in the year 1892, thus bringing the offense without the bar of the statute of limitations. The particular date alleged in the information was not material to the sufficiency of the charge, and we see nothing in this point to justify a new trial of the action." People v. Cuff, 122 Cal. 589, 55 P. 407, is to the same effect.

In People v. Miller, supra, the court said:

"It is contended that the information is insufficient, in that it does not state the precise time at which the offense was committed, nor that it was committed before the filing of the information. Citing People v. Lafuente, 6 Cal. 202; People v. Aro, 6 Cal. 207, 65 Am. Dec. 503; People v. Sheldon, 68 Cal. 434, 9 P. 457; Pen. Code, §§ 951, 955. It is urged that the term 'on or about' may include a time subsequent to the accusation, and therefore charges an impossible act; that charging the offense as having been committed 'on or about a certain day,' and not averring that it was done 'before the filing' of the information, avers two inconsistent propositions, namely, that 'the offense was committed, and that it was not committed.' People v. Squires, 99 Cal. 327, 33 P. 1092, and People v. Moody, 69 Cal. 184, 10 P. 392, are cited.

[1] "In the Moody Case the information was filed June 18, 1885, and the offense was charged as committed on July 20, 1885, and it was held that no offense was charged. People v. Squires, supra, more nearly illustrates the point, but, we think, is authority against defendant's contention. The information is sufficient if it can be understood therefrom 'that the offense was committed at some time prior to the time of finding the indictment or filing of the information.' Subdivision 5, § 959, Pen. Code. In the Squires Case the court said: 'One may be accused of an offense on the very day of its commission, and, as already said, to accuse is to state that the act charged was prior to the accusation.' In the present case the accusation was made on November 26th, and the act was charged to have been committed 'on or about November 24th.' This by no possibility could be taken to mean a date subsequent to filing the information, for it would still be true under this allegation, as in the Squires Case, that 'to accuse is to state that the act charged was prior to the accusation.'"

[2] In the instant case the information did not charge that the offense was committed prior to its filing. However, if "to accuse one of the commission of a crime is to charge that it was committed prior to the accusation" the cases of People v. Dinsmore, supra, and People v. Cuff, supra, are direct authorities for our holding that the information before us, while defective, does charge a public offense.

[3] We have examined the record and have concluded that appellant suffered no possible prejudice from the mistaken date in the information which was clearly a typographical error. The first witness for the people testified that the burglary was committed on December 20, 1933. No question of variance was ever raised during the trial. Appellant produced numerous witnesses who testified he was in Martinez on December 20, 1933. The defect in the information was not mentioned in the specifications of error filed in the court below unless it was included in the following: "That the verdict is contrary to the law and evidence," and, "That the court erred in overruling and denying defendant's motion for a new trial." The written motion for new trial, if one was filed, is not in the record and the grounds of the motion do not appear in the minutes. It seems probable that appellant did not know of the error until after he had taken his appeal to this court. Under these circumstances we are prohibited from reversing the judgment on account of the error in the pleadings, by the provisions of section 4½ of article 6 of the Constitution.

[4, 5] Appellant bases his second contention for a reversal of the judgment upon the ground that the testimony of an accomplice is not sufficiently corroborated. In People v. Yeager, 194 Cal. 452, 229 P. 40, 49, it is said: "It has been held that to corroborate an accomplice the evidence need not establish the actual commission of the offense, nor extend to every fact and detail covered by the statements of the accomplice, or to all the elements of the offense, nor prove that the accomplice has told the truth. The corroborative evidence must tend in some slight degree, at least, to implicate the defendant. While it need not be strong, more is required by way of corroboration than a mere suspicion. It is sufficient if the corroborating evidence tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to little weight. It is not necessary to corroborate the accomplice by direct evidence. If the connection of the accused with the alleged crime may be inferred from the corroborating evidence in the case, it is sufficient."

The testimony of the accomplice was to the effect that appellant not only participated in the burglary but also in securing a place to store the stolen property. It should not be necessary to extend this opinion by detailing the corroborating evidence. It should be sufficient to state that we have examined the record and believe it sufficient under the rule just quoted.

[6] The misconduct of the trial judge urged as reversible error occurred in the following colloquy which came at the end of the people's case:

"Mr. Frame: Does the Court think there is sufficient corroboration in this case to go on?

"The Court: I think so.

"Mr. Frame: All right. Call the defendant, Roy Myers."

Of course, it must be admitted that the remark of the trial judge should not have been made in the presence of the jury, but appellant directly asked for it through his attorney. He did not assign it as error and did not request that the jurors be instructed to disregard it. A defendant cannot lead a trial judge into error, fail to call his attention to the error, or assign the error, and then expect the judgment to be reversed on appeal.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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1 Cal.App.2d 740

BENJAMIN v. McCLURE.

Civ. 8400.

District Court of Appeal, Second District, Division 1, California.

Nov. 5, 1934.

Appeal and error 🔑1010(1)

Judgment will be affirmed on appeal, where no question of law is presented in briefs and trial court's findings necessary to support judgment are sustained by sufficient evidence.

◆

Appeal from Superior Court, Los Angeles County; Stephen G. Long, Judge.

Action by O. G. Benjamin against Frank D. McClure. Judgment for plaintiff, and defendant appeals.

Affirmed.

Frank D. McClure, of Los Angeles, and Gordon X. Richmond, of Orange, for appellant.

Will H. Winston, of Long Beach, for respondent.

PER CURIAM.

A sale of the property of the Bolivar Holding Company, a corporation, was set for March 27, 1925, in the course of foreclosure proceedings commenced by the holder of a trust deed upon which more than $100,000 was due. A meeting of the stockholders of the Bolivar company was called and defendant, an attorney at law, employed by them to take steps to stop the sale and to adjust the company's financial difficulties. A petition for adjudication in bankruptcy was filed. Thereafter for several years efforts were made to save the stockholders from loss. Several corporations were organized by the defendant to take over the property of the company, among them the Seaside Commercial Club of Nevada and the Seaside Commercial Club of California. About April, 1926, after other efforts had failed, the defendant induced a number of the stockholders to purchase memberships in the Seaside Commercial Club (of which state does not appear). Plaintiff was among the stockholders to purchase the memberships, and he brings this action for himself and as assignee of a number of other stockholders to recover the amount paid in for this purpose. For the memberships plaintiff and his assignors paid the sum of $22,802.89, which was placed under the control of defendant. Thereafter the All States Building Corporation (of which defendant's private secretary owned all the stock), the then holder of the title to the property, under date of July 20, 1927, gave a promissory note for the said amount paid in for the memberships, made payable to defendant as trustee for the Seaside Commercial Club. By agreement of all concerned, the amount of this note was later reduced to $20,000. Thereafter the then record holder of the title to the real property of the Bolivar company, C. J. Laughren, trustee, by declaration of trust dated February 6, 1928, declared that he held the title to the property in trust for certain beneficiaries, among whom were the owners of the promissory note for $20,000. The property was about to be again transferred, and it became necessary to safeguard a title company, which had been engaged to issue a title certificate, against loss on account of the so-called incumbrance. For this purpose the sum of $20,000 was deposited with the title company, and the defendant delivered to the title company the note which he held as trustee. The note was not recovered, and it has become of no value to plaintiff and his associates. The cash delivered to the title company was not used to reimburse plaintiff and his assignors for the money paid in for the memberships, although one of the other stockholder-members was reimbursed from this fund. The plaintiff stockholders have suffered the loss of their original investment and also the additional sum with which they purchased the club memberships. The trial court gave judgment in favor of plaintiff for the proportionate amount paid by himself and assignors for the memberships. The transactions of the various parties in this undertaking were very complicated. In his brief appellant, under the heading "statement of the case," covers almost twenty-five pages, and respondent, in his "statement of the case," covers almost forty-two pages. For the purposes of this opinion, it would not be necessary or proper to set forth in detail all of the many activities of the parties.

It is alleged in the complaint that the defendant knowingly made certain false representations to the plaintiff and his assignors concerning the condition of the affairs of the parties and the status of the various negotiations at the time he induced them to purchase the memberships, and that defendant "never intended to establish a commercial club to be known as the Seaside Commercial Club"; that defendant wrongfully permitted the real property originally owned by the Bolivar company to be transferred and wrongfully surrendered the promissory note which had been given to secure the plaintiff and his assignors. With minor exceptions, all of the allegations of the complaint were found by the trial court to be true.

No question of law is presented in the briefs, but defendant contends that the evidence is insufficient to sustain the findings. An examination of the record discloses that there is sufficient evidence to sustain those findings which are necessary to support the judgment.

The judgment is affirmed.

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1 Cal.App.2d 743

COMBES v. BOND et al.

Civ. 9429.

District Court of Appeal, Second District, Division 1, California.

Nov. 5, 1934.

Appeal and error 🔑786

Appeal from judgment on ground that evidence was insufficient to sustain jury's findings, that damages awarded were excessive, and that decision was against law, was dismissed on ground that appeal was taken for delay only, where conflicting evidence was sufficient to warrant rendition of judgment, and damages awarded were not so large as to show passion or prejudice.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Elizabeth Helen Combes against Gordon C. Bond and another. From a judgment for plaintiff, defendants appeal and plaintiff moves to dismiss the appeal.

Appeal dismissed.

Cruickshank, Brooke & Evans, of Pasadena, for appellants.

Paul Blackwood and Bingham Gray, both of Los Angeles, for respondent.

PER CURIAM.

This is a motion to dismiss the appeal from a judgment rendered by the trial court pursuant to a verdict returned by a jury for the sum of $10,000 in favor of plaintiff. The ground of the motion is "that said appeal was taken for delay only and that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

In substance, the points presented by appellants are that the evidence was insufficient to sustain the implied findings made by the jury either that defendant was guilty of negligence, or that plaintiff was not guilty of contributory negligence; that the damages awarded by the jury were excessive; and that "the decision is against law."

Without reviewing the evidence, it may suffice to state that from the several statements of fact that appear in appellants' brief, it becomes apparent that, both on the question of negligence of the defendants and on the question of the contributory negligence of plaintiff, the evidence adduced by the respective parties was conflicting one with the other, but that sufficient substantial evidence was presented on the trial of the action to justify the jury in reaching its conclusion of which appellants complain. Nor do we find that the evidence, which the jury was authorized to conclude was true, presented a situation which requires this court to decide that the "decision is against law." In other words, the evidence was sufficient, both in law and in fact, to warrant the rendition of the judgment.

On the question of excessive damages, although the amount awarded by the jury may appear to be large, nevertheless, considering the injuries that, according to the testimony of plaintiff and her witnesses, were sustained by the former, the compensation allowed to plaintiff well may be within the bounds of reason. At any rate, the damages are not so large that the amount thereof causes an abiding impression that the verdict therefor was the result of passion or prejudice on the part of the jury.

It follows that the motion to dismiss the appeal should be granted. It is so ordered. The appeal is dismissed.

* * *

1 Cal.App.2d 584

DEPARTMENT OF PUBLIC WORKS et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 5234.

District Court of Appeal, Third District, California.

Oct. 24, 1934.

Hearing Denied by Supreme Court Dec. 20, 1934.

1. Master and servant ⇨419

Reviewing court does not weigh value or credibility of medical testimony in compensation proceeding.

2. Master and servant ⇨419

In compensation proceeding, testimony of doctor in report to commission that past history of employee had no bearing on present injured condition *held* sufficient "good cause" for order rescinding earlier award and establishing finding that all disability sustained was due to injury complained of (St. 1917, p. 850, § 20 (d).

◆

Petition by the Department of Public Works of the state of California, Division of Highways, against Industrial Accident Commission of the state of California and James Alexander, for a writ of review to set aside and annul an order altering and amending findings and award in compensation proceeding.

Award affirmed.

B. E. Pemberton, Ivan A. Schwab, and Edmund D. Leonard, all of San Francisco, for petitioner.

Everett A. Corten and Emmet J. Seawell, Asst. Atty., both of San Francisco, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Petitioner, department of public works, seeks by this writ of review to set aside and annul an order entitled, "Order altering and amending findings and award and supplemental order for good cause under Section 20 (d)" (referring to Workmen's Compensation Act, St. 1917, p. 831, and amendments thereto), whereby it was found that James Alexander, the claimant, sustained an injury which resulted in permanent disability of 100 per cent. and that the entire disability was caused by an injury sustained by said employee while engaged in and arising out of the course of his employment.

It is conceded by respondent that the sole question for consideration is whether the record discloses "good cause" for the order of the commission in rescinding its earlier award and establishing a finding that all the disability sustained by applicant was due to the injury complained of.

The facts briefly are that Alexander, in November, 1930, was working for petitioner as a carpenter. On that date, while engaged in his work, he was knocked from the truck upon which he was working, falling about 25 feet into a canyon, causing injury. He was assisted to the camp, where he was given medical treatment. After remaining in bed for a period of time, he returned to his work on December 11, 1930, and worked until January 3, 1931, when by reason of pain in his back he was forced to quit.

The findings and award were filed on July 29, 1932, wherein applicant was awarded total temporary disability indemnity compensation from the date of the accident to and including May 15, 1932, and 50 per cent. partial disability compensation from May 15, 1932, indefinitely. Thereafter on November 7, 1933, an order was made allowing the applicant a permanent disability rating of 82 per cent. However, this was apportioned on the basis of 40 per cent. to pre-existing diseases and 60 per cent. to disability. The applicant on this apportionment basis was allowed a permanent disability rating equal to 49¼ per cent. Applicant thereafter applied for additional compensation and medical treatment. The commission, after further hearing and after receiving further medical reports, issued its order here complained of.

Section 20 (d) of the Workmen's Compensation Act (St. 1917, p. 850) provides:

"The commission shall have continuing jurisdiction over all its orders, decisions and awards made and entered under the provisions of sections six to thirty-one, inclusive, of this act and may at any time, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter or amend any such order, decision or award made by it upon good cause appearing therefor, such power including the right to review, grant or regrant, diminish, increase or terminate, within the limits prescribed by this act, any compensation awarded, upon the grounds that the disability of the person in whose favor such award was made has either recurred, increased, diminished or terminated; provided, that no award of compensation shall be rescinded, altered or amended after two hundred forty-five weeks from the date of the injury. Any order, decision or award rescinding, altering or amending a prior order, decision or award shall have the same effect as is herein provided for original orders, decisions or awards."

In Bartlett Hayward Co. v. Industrial Accident Commission, 203 Cal. 522, 265 P. 195, 199, the court said:

"It is our conclusion, therefore, that the continuing jurisdiction of the commission as provided by section 20 (d) of the Act of 1917 is not limited to the consideration of changes in the physical condition of the workman, but is extended to the right to rescind, alter or amend the orders, decisions, or awards upon good cause appearing therefor. What constitutes 'good cause' depends largely upon the circumstances of each case. The term is relative. It may be assumed that the determination of the commission as to what constitutes 'good cause,' while entitled to great weight, would not be conclusive. Certainly it may be said, so far as the facts in the present case are concerned, that the mistake or inadvertence of the commission in giving the injured workman, Slate, a rating of 25 per cent. permanent disability, when as matter of law on the undisputed facts he was entitled to a rating of 100 per cent. permanent disability, would constitute 'good cause' for the exercise of continuing jurisdiction of the commission. In fact, the demands of justice would seem to require that the compensation be so increased under the circumstances here shown."

[1, 2] The record discloses that expert medical testimony was produced by the petitioner and respondents, both at the original hearing and upon the hearing of the petition to modify, and, in accordance with the well-established rule, it is not the province of this court to weigh the value or credibility thereof. We believe, however, that the testimony of Dr. Donald McNeil in a report to the commission filed March 27, 1934, and considered by the commission at the latter hearing is sufficient "good cause" for the altered findings and award and supplemental order filed by the commission.

It is the contention of petitioner that a reading of the entire report of Dr. McNeil shows that when the doctor states "his (applicant's) past history has no bearing on the present condition," that he referred to certain specific conditions such as round shoulders, and three broken ribs, a broken right forearm and hernia, which applicant had suffered several years prior to the injury sustained in November, 1930, but we cannot find substantiation for so construing the report.

Dr. McNeil in his report states:

"Examination showed a well-developed and rather undernourished man of about fifty years of age. He walks with great difficulty, with the legs markedly bowed and a marked stoop in his upper back with considerable side sway. He is restless when sitting and constantly changes his position, assuming the erect posture at times for relief. He apparently is in pain.

"His past history has no bearing on the present condition. He states he has been in good health up to the accident but that he was more or less round shouldered most of his life. Three ribs were broken fourteen years ago. The right forearm was broken in 1926 and he had a repair of a hernia in 1923. In my opinion none of these have any bearing on his present condition. * * *

"X-ray examination of the dorsal and lumbar spine shows extreme hypertrophic changes involving the entire spine with kyphosis and scoliosis in the dorsal region and marked anterior wedging of the vertebra.

"There is no evidence of any fracture of the bodies of the lumbar vertebra. There is presumptive evidence of what might be an old fracture of the right transverse processes of the 2nd, 3rd, 4th and 5th lumbar vertebrae with good healing in good position. The same is true of a chip on the superior surface of the left articular process of the 4th lumbar vertebra.

"Examination at the present shows this man to be suffering from a condition known as Spondylose Rhizomelique, or Arthritis Deformans of the spine with involvement of the shoulders and hips it becomes known as the Marie Strumpell type of spondylitis deformans. Apparently his old fractures are well healed."

Without discussing the issues further, we are of the opinion that not only did the commission have "good cause" for its amended award, but to have found otherwise would have been an abuse of discretion and a lack of sympathy with the spirit and purpose of the act.

The award is affirmed.

We concur: **PLUMMER, J.**; **R. L. THOMPSON, J.**

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2 Cal.App.2d 10

GROOBMAN v. PFEIFFER.

Civ. 5123.

District Court of Appeal, Third District, California.

Nov. 5, 1934.

1. Appeal and error 🔑965

In passing upon motion for change of venue on grounds of convenience of witnesses, order of trial court based on conflicting evidence will not be disturbed in absence of abuse of discretion.

2. Appeal and error 🔑912

In considering affidavits on motion for change of venue, if there is any conflict in affidavits, those in favor of prevailing party must be taken as true.

3. Venue 🔑52(1)

In action by walnut packing company against its agent for loss in sale of walnuts, change of venue having been had to county of agent's residence, company's motion for change of venue on ground of convenience of witnesses *held* properly denied, where company had only two more witnesses to alleged sale agreement residing in its county than agent had, and agent had large number of witnesses residing in his county or within 50 miles of place of trial who would testify concerning grade and quality of walnuts shipped (Code Civ. Proc. § 397, subd. 3).

◆

Appeal from Superior Court, Butte County; J. O. Moncur, Judge.

Action by I. Groobman, doing business as the Whittier Walnut Packing Company, against F. M. Pfeiffer. From an order denying change of place of trial, plaintiff appeals.

Affirmed.

Miller & Kepple, of Whittier, for appellant.

Ware & Ware, of Chico, for respondent.

Mr. Justice **PLUMMER** delivered the opinion of the court.

This cause is before us upon an appeal by the plaintiff from an order of the trial court denying plaintiff's petition for a change of place of trial, based upon the third subdivision of section 397 of the Code of Civil Procedure. The action was originally instituted in the county of Los Angeles, and thereafter, upon the application of the defendant, transferred to the county of Butte, the residence of the defendant.

The complaint is in three counts, only one of which we need consider. The first count of the amended complaint alleges that in the year 1932, an agreement was made between the plaintiff and the defendant whereby the defendant agreed to purchase walnuts in the Butte county district, of such grade and quality as the plaintiff should instruct the defendant to buy; that thereafter the defendant purchased and delivered to the plaintiff four carloads of walnuts during the season of 1932, representing that said walnuts were of good quality, and of such grade as the plaintiff had ordered; that when the plaintiff received the first carload of walnuts he notified the defendant that the nuts were not of the grade and quality ordered, and directed the defendant to ship no more walnuts of such grade and quality; but that the defendant disregarding the instructions, proceeded to ship the other cars referred to; that when the cars were received at the packing house belonging to the plaintiff in the county of Los Angeles, the plaintiff notified the defendant of the alleged inferior quality of the walnuts; that the plaintiffs refused to accept the walnuts; that the defendant called upon the plaintiff in the county of Los Angeles; and that an agreement was entered into relative to the disposal of the walnuts, whereby the respective parties were to equally share in the losses or in the profits, if any were received in the disposal of the walnuts.

It is alleged also that the plaintiff paid to the defendant the sum of $9,938.27; that the plaintiff succeeded in selling the walnuts for the sum of $7,272.44, leaving a deficit in the sum of $2,665.83. Other counts in the complaint allege other items which do not need to be considered herein. It is further alleged in the complaint that the walnuts were of an inferior quality, etc.

The answer of the defendant denies the inferior quality of the walnuts; denies the agreement as set out in the plaintiff's complaint; and alleges that the plaintiff agreed to and authorized the defendant to purchase walnuts at a certain specified price per pound, and allow the defendant a commission of one-half cent a pound for the walnuts purchased by him as agent for the plaintiff; and that the walnuts purchased by him were of the grade and quality which he was authorized to purchase.

The affidavit filed by the plaintiff in support of his motion for the retransfer of the cause to Los Angeles for trial is based upon the convenience of witnesses, and sets forth two propositions: The alleged agreement entered into between the plaintiff and the defendant; and that at the time of the agreement relative to sharing the profits and losses there were present seven witnesses who heard the agreement alleged to have been entered into between the plaintiff and the defendant, modifying the agreement or the authorization under which the defendant had acted in the first instance in the purchase of the four cars of walnuts. Also, the affidavit sets forth the names of a number of witnesses, by whom the plaintiff hopes to prove the inferior quality of the walnuts in question, and that all of these witnesses reside in the county of Los Angeles.

In opposition to the affidavit of the plaintiff, the defendant has filed an affidavit in which it is set forth that only three of the persons, named by the plaintiff as being present at the conversation alleged to have taken place between the plaintiff and the defendant in the county of Los Angeles, were actually present. The defendant also sets forth his version of the conversation and agreement, and deposes that the witnesses who were present at the time of the conversation will not testify as the plaintiff alleges, but would testify that the conversation and agreement was and is as alleged by the defendant. The affidavit of the defendant also shows that the witness H. H. Huffman, who was present at the time of the conversation, resides in the county of Butte, the county to which the case has been transferred for trial.

The affidavit of the defendant also sets forth the names and residences of numerous witnesses, some fifteen or twenty in number, residing within fifty miles of the city of Oroville, county of Butte, the place to which said trial has been transferred, all of whom will testify that the grade and quality of the walnuts shipped to the plaintiff were of the grade and quality ordered by the plaintiff, and of the grade and quality that had been shipped by the defendant to the plaintiff from the Chico-Butte district during previous years.

[1-3] It thus appears that if the respondent's affidavit was accepted by the court as containing a correct statement of the facts the plaintiff had present at the alleged conversation, and at the time of entering into the modified agreement, only two more witnesses than had the defendant, assuming that they would testify as alleged by the plaintiff, and that the defendant must necessarily call a number of witnesses residing in Butte county, or within fifty miles of the place of trial.

In passing upon a motion for change of place of trial on the ground of convenience of witnesses, the order of the trial court will not be disturbed unless there is an abuse of discretion, and especially is this the case where there is a conflict in the evidence.

In McKenzie v. Barling, 101 Cal. 459, 36 P. 8, 9, the rule in this particular is thus succinctly stated: "At all events, we could not disturb the ruling of the court below in the premises, for the evidence was certainly conflicting in a marked degree." In that case, just as in this, the affidavit of the respondent controverted all the allegations contained in the affidavit of the plaintiff relative to the issues tendered for trial.

The same rule was enunciated by this court in the case of Tulare Power Co. v. Pacific Surety Co., 43 Cal. App. 315, 185 P. 399.

In the case of Sourbis v. Rhoads, 50 Cal. App. 98, 194 P. 521, this court said: "In considering the affidavits used upon the said motion, this court is bound by the same rule that controls where oral testimony is presented for review. 'If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered as established.' McKenzie v. Barling, 101 Cal. 462, 36 P. 8; Doak v. Bruson, 152 Cal. 18, 91 P. 1001; Henderson v. Cohen, 10 Cal. App. 585, 102 P. 826."

Other cases might be cited, but the foregoing we deem sufficient. What we have said being determinative of this appeal, it is unnecessary to consider any of the issues tendered by the cross-complaint filed by the defendant.

The order denying the plaintiff's motion for a change of place of trial is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

* * *

1 Cal.App.2d 725

PEOPLE v. LITTLEFIELD.

Cr. 2580.

District Court of Appeal, Second District, Division 1, California.

Nov. 2, 1934.

Hearing Denied by Supreme Court Nov. 30, 1934.

1. Criminal law 🔑807(1), 811(5)

Refusal of instructions which were argumentative in form and directed attention of jury to testimony of specified witnesses *held* not error.

2. Criminal law 🔑829(1)

Refusal of instructions given in substance and effect in other instructions *held* not error.

Appeal from Superior Court, Los Angeles County; William O. Doran, Judge.

Emerald C. Littlefield was convicted of rape, and he appeals.

Affirmed.

Hearing denied by Supreme Court; PRESTON, J., dissenting.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

HOUSER, Justice.

Defendant appeals from a judgment which followed his conviction of the crime of rape; also from an order by which his motion for a new trial was denied.

In substance, the principal contention of appellant is that the evidence was insufficient to support the verdict of the jury that was returned against him.

The briefs that have been filed herein clearly show that all parties to this appeal have full knowledge of all the evidence that was introduced on the trial of the action. No other person would be benefited by having such a recital included herein. It is enough to know that, after full consideration of all the evidence adduced by the prosecution, this court is of the opinion that it was sufficient to sustain the verdict of which appellant complains.

[1, 2] Appellant also predicates prejudicial error upon the refusal by the trial court to give to the jury certain instructions that were requested by defendant. As to some of such offered instructions, it is clear that because they were both argumentative in form and directed the attention of the jury to the testimony of specified witnesses, no error was committed by the trial court in refusing to give such instructions to the jury. As to the remaining proposed instructions to which appellant has directed attention, an examination of other instructions that were given to the jury shows that in substance and effect they included all the principles of law that were contained in the refused instructions.

The judgment and the order by which the motion for a new trial was denied are affirmed.

We concur: CONREY, P. J.; YORK, J.

* * *

1 Cal.App.2d 678

In re NUTTLE'S ESTATE.

BABCOCK v. WOOD et al.

Civ. 9963.

District Court of Appeal, Second District, Division 2, California.

Oct. 31, 1934.

1. Executors and administrators 🔑315(9)

Reservation, in order for partial distribution of decedent's estate, that position and contentions of petitioner and objector were reserved to respective parties without prejudice, *held* to refer to position and contentions not decided by order.

2. Wills 🔑106

Bequest of $50,000 "par value U. S. Government bonds now in my safety deposit box" at certain bank *held* not objectionable for uncertainty, where safety deposit box contained Liberty Loan bonds and U. S. A. Treasury notes in amount exceeding bequest, since both Liberty Loan bonds and Treasury notes issued by government are properly designated "government bonds."

[Ed. Note.—For other definitions of "Government Bond," see Words & Phrases.]

3. Executors and administrators 🔑314(8)

Verified petition that specific legacy be distributed to petitioner, verified objections, inventory and appraisement, and admissions of interested parties *held* to make sufficient showing to justify order of partial distribution, though no other evidence was introduced.

◆

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

In the matter of the estate of J. T. Nuttle, also known as John T. Nuttle, deceased. Petition by Juana M. Wood, opposed by Leota Babcock and the Security-First National Bank of Los Angeles, executor, and A. E. Nuttle. From an order of partial distribution, Leota Babcock appeals.

Affirmed.

Richard J. O. Culver, of Los Angeles, for appellant Leota Babcock.

A. J. Verheyen, of Los Angeles, for appellant Security-First Nat. Bank of Los Angeles.

Joseph Scott, of Los Angeles (T. C. Heyl and C. J. Scott, both of Los Angeles, of counsel), for respondent Juana M. Wood.

ARCHBALD, Justice pro tem.

Appeal by objector from an order of partial distribution distributing certain bonds enumerated therein to respondent Juana M. Wood.

Decedent left a will making the following specific bequest: "Second: I give, devise and bequeath to Juana M. Wood of Los Angeles, California, Fifty Thousand Dollars ($50,000.00) par value U. S. Government bonds now in my safety deposit box at Security-First National Bank of Los Angeles." Appellant was given a specific legacy, and was also made residuary legatee and devisee. The inventory and appraisement filed shows the value of the estate to be $178,508.94, among which is a $500 share in one $1,000 U. S. A. Fourth Liberty Loan bond and $28,000 par value of U. S. A. Treasury 4¼ notes. It seems to be an admitted fact that in decedent's safety deposit box were found Liberty Loan bonds of the par value of $30,000 and U. S. A. Treasury notes of the par value of $38,000, and that of all the bonds and notes so found all but $28,500 were claimed by the J. T. Investment Company, a Kansas corporation, of which 1,000 shares of the capital stock of such corporation represented by certificates numbered 1, 2, 3, 5, and 8 for five shares each and certificate No. 6 for 975 shares are inventoried as the property of decedent. A verified petition was filed by respondent Juana M. Wood praying that said specific legacy of $50,000 U. S. government bonds (among other specific legacies), or such part as the court might designate, be distributed to her, and alleging that the estate was "but little indebted"; that, "so far as your petitioner knows, the only debts of the estate, other than the expenses of administration, are a $25,000.00 note executed by the decedent herein," which is amply secured; that the executor after such partial distribution will have in his hands "ample funds to satisfy all such debts and charges"; and that such distribution may be made "without loss to the creditors of said estate." Upon information and belief such respondent further alleged that the assets of said estate "include $60,000 worth of United States government bonds."

Such allegations were all denied in written objections filed in opposition to such distribution by the executor and respondent Leota Babcock. At the hearing of said petition and said objections so filed, no other evidence was introduced, but said executor stated in open court through its attorney "that in its opinion probably no harm would be done by a distribution at this time of $20,000 par value of the bonds." At the same time counsel for appellant herein stated that, "if the court should distribute to Miss Wood more than $28,500.00 worth of bonds [the amount listed in the inventory of the estate] my client will object to distribution, as such action by the court would involve making distribution of property in which my client might have an interest and in which we contend Miss Wood does not have a right to distribution, as it is not property of the estate but assets of the J. T. Investment Company"; and that, "if Miss Wood is held to be entitled only to $28,500 in bonds or less then I am sure my client will never raise any objection." Following such statement, the court ordered distribution to said petitioner of "$20,000 par value of bonds." This was followed by a signed order which distributed to respondent Wood, among other specific bequests, all of said U. S. A.

Treasury notes (designating them by their numbers), with the exception of eight thereof of the par value of $1,000 each; such order further providing "that the position and contentions of said Juana M. Wood [evidently as to the ownership of certain government bonds of the estate] in her petition for partial distribution," and the "position and contentions of the executor herein and Leota Babcock and A. E. Nuttle in their objections to said petition be and the same are hereby reserved to these respective parties without prejudice." An appeal from the order so made is taken by said Leota Babcock alone.

[1] The language of said reservation is only susceptible to the construction that the "position and contentions not decided by the order should be reserved," and not as appellant urges, that her contention that there should not be a partial distribution is also reserved. The contention made as to the aggregate amount of bonds owned by the estate still remained to be decided.

[2] The petition of respondent Wood, as well as the objections filed by the executor and appellant, designate the Liberty Loan bonds as well as the Treasury notes found in the safety deposit box, whether inventoried as belonging to the estate or claimed by the J. T. Investment Company, as "government bonds," as did the attorneys in their statements to the court as hereinbefore shown. Webster's New International Dictionary, under the subhead "Specific: Finance," in defining "bond," says: "Such an instrument made by a government or corporation as an evidence of debt, usually for the purpose of borrowing money; hence, loosely, any interest bearing certificate issued by a government or corporation, esp. when a date is set for the payment of the principal." We therefore are of the opinion that both Liberty Loan bonds and Treasury notes issued by the government are properly designated "government bonds," that there is no uncertainty in the bequest under the facts shown herein, and that no error was committed by the court in so designating the Treasury notes described in the order. The bequest was "$50,000.00 par value," and we think it would be immaterial if a difference existed between the par and market value of the respective "bonds."

[3] In our opinion, the verified petition, verified objections, the inventory and appraisement, and the admissions of interested parties made a sufficient showing to justify the order (Estate of Johnson [Cal. Sup.] 218 Cal. 501, 23 P.(2d) 1012), and that the court did not abuse the discretion vested in it in so ruling.

Order affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

1 Cal.2d 691

LEWIS et al. v. PACIFIC STATES SAVINGS & LOAN CO. et al.

Sac. 4780.

Supreme Court of California.
Oct. 29, 1934.

1. Usury 🔑52, 53

Charges for so-called amortization service and notarial, escrow, and recording fees, and expenses of examination and appraisement of property on which loan was made, *held* properly deducted as interest exacted without written provision therefor in contract of loan (Gen. Laws 1931, Act 3757, § 1).

2. Usury 🔑49

In testing transaction for usury, provision for interest upon interest is considered (Gen. Laws 1931, Act 3757, §§ 1–3).

3. Usury 🔑50

In testing loan agreement for usury, bonus exacted from borrower for making loan must be taken out as of date when it is to be paid by terms of agreement or at time of advancing loan if deducted at that time, and interest computed on remainder (Gen. Laws 1931, Act 3757, §§ 1–3).

4. Usury 🔑42

Loan agreement charging interest on bonus exacted by lender for alleged services in procuring loan *held* not usurious, where aggregate interest on loan did not exceed 12 per cent. per annum (Gen. Laws 1931, Act 3757, §§ 1–3).

5. Pleading 🔑147

In action to enjoin sale of real estate under deed of trust for usury, cross-complaint for foreclosure of chattel mortgage and for impounding of rents under instruments given as independent security for debt secured by deed of trust *held* allowable, since causes of action alleged in cross-complaint grew out of contract sued upon (Code Civ. Proc. § 442; Gen. Laws 1931, Act 3757, §§ 1–3).

* * *

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Manuel Lewis and another against the Pacific States Savings & Loan Company and others, in which the named defendant filed a cross-complaint. From an adverse judgment, the plaintiffs appeal.

Affirmed.

Sheridan Downey, of Sacramento, Morgan V. Spicer, of San Francisco, and Anthony J. Kennedy, of Sacramento, for appellants.

Orrick, Palmer & Dahlquist, of San Francisco, for respondents.

PRESTON, Justice.

This appeal involves the construction of certain provisions of sections 1, 2, and 3 of the so-called Usury Act (Stats. 1919, p. lxxxiii; Act No. 3757, p. 1908 et seq., Deering's Gen. Laws 1931).

On September 7, 1928, plaintiffs executed to defendant Pacific States Savings & Loan Company of Stockton, Cal., their promissory note in the principal sum of $172,000, with interest thereon at 7 per cent. per annum, principal and interest payable as follows: $1,604.76 on October 20, 1928, and the same amount monthly thereafter for a period of five years, to wit, until September 20, 1933, at which time the balance of the principal, to wit, $129,000, was to be due and payable. Unpaid principal and interest, when not paid according to the agreement, were to draw interest at the rate of 10 per cent. per annum. It was further provided that failure for a period of ten days to pay any installment of principal and interest in full authorized the payee, at its option, to declare the whole obligation due and payable. The note was secured by deed of trust of even date naming Pacific States Auxiliary Corporation as trustee. To further secure said obligation, plaintiffs executed, on said date, to said loan company, a chattel mortgage on the contents of the apartment house located on said property mentioned in the deed of trust. As still further security, plaintiffs, on said date, assigned to said loan company the rents due and thereafter to become due them as owners of said property.

Plaintiffs made the payments provided for for some twenty-six months, to wit, until November 20, 1930. They thereafter defaulted, failing also to discharge the second installment of taxes for the fiscal year 1929–1930 as well as the first installment for the year 1930–1931, both of which items were liquidated by the loan company. On December 18, 1930, said loan company caused the trustee to duly record a notice of breach and election to sell under the deed of trust, whereupon plaintiffs instituted this action to enjoin a sale under said deed of trust on the ground that they were not in default, praying that said transaction be declared usurious; that a penalty in treble the amount of all interest paid be imposed; also that the maturity date of the entire principal be postponed until the end of the period of forbearance without interest.

The issues thus tendered were met by a sufficient answer and at the same time a cross-complaint was interposed by defendants, seeking a foreclosure of the aforesaid chattel mortgage as well as the impounding of the rents yielded by said property. The cause came on for trial and the court made findings and gave judgment granting a measure of relief to plaintiffs, consisting of the following: A provision enjoining the sale under said deed of trust on the ground that the notice of breach and election to sell, recorded December 18, 1930, was prematurely given and made; also fixing the then total amount due from plaintiffs to defendant loan company at the sum of $169,279.54, but likewise decreeing that plaintiffs were in default at that time, and further decreeing a foreclosure of the chattel mortgage and the impounding of the rents, and for a deficiency judgment in the event of failure to realize the full amount due from said sale and from said rents.

Plaintiffs appealed. All questions raised by them center around two contentions: (1) That partial relief only was granted to them under their claim of usury; (2) that a foreclosure of the chattel mortgage and other relief granted upon the cross-complaint was unwarranted. We shall now consider these contentions:

[1] The court found that the loan company at the time of granting the loan deducted from the principal and retained to itself a so-called amortization service charge of $9,030; also an item of $1,800, designated as for notarial, escrow, and recording fees and expenses for examination and appraisement of the property and buildings and kindred items. The court declared the whole first item and $1,600 of the second item to be in reality interest exacted without written provision therefor in the contract, hence a violation of section 1 of said Usury Act. These items were therefore disallowed and deducted, with interest from the principal. This action was clearly proper and of it plaintiffs do not complain.

[2-4] But plaintiffs do complain of failure of the court to find that inasmuch as these excluded items themselves bore interest, the loan company had exacted interest upon interest in violation of sections 2 and 3 of the Usury Law and thereby incurred the penalty of treble damages. In other words, while conceding that the interest exacted, under whatsoever form, did not, in the aggregate, exceed the limit of 12 per cent. per annum, over the period of forbearance, yet, by taking interest upon the disallowed items, defendants collected compound interest and thus became liable for the treble penalty. In this contention plaintiffs are clearly in error.

So much of section 2 as is here pertinent reads as follows: "No * * * company * * * shall directly or indirectly take or receive in money * * * or in any other manner whatsoever, any greater sum or any greater value for the loan or forbearance of money * * * than at the rate of twelve dollars upon one hundred dollars for one year; and in the computation of interest upon any * * * note, or other instrument or agreement, interest shall not be compounded, nor shall the interest thereon be construed to bear interest unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith. Any agreement * * * in conflict with * * * this section shall be null and void as to any agreement * * * to pay interest and no action at law to recover interest in any sum shall be maintained and the debt cannot be declared due until the full period of time it was contracted for has elapsed."

We have already seen that giving full effect to the contentions of appellants, the limit of 12 per cent. per annum for the period of forbearance is not overreached. Besides, the promissory note itself provides for the payment of interest at the rate of 10 per cent. per annum upon all installments or portions thereof remaining unpaid at any maturity date. This would seem to be the compound interest or interest upon interest referred to by the act. The fact that the condemned items remain a part of the principal as shown by the face of the obligation, and draw interest, does not bring the transaction under the penalties prescribed by sections 2 and 3 of said act. This interest upon interest is taken into consideration when testing the transaction for usury, as announced in the case of Haines v. Commercial Mortgage Company, 200 Cal. 609, 625, 254 P. 956, 255 P. 805, 53 A. L. R. 725. See, also, Smith v. Parsons, 55 Minn. 520, 57 N. W. 311; Hutchinson v. Herrick, 58 Minn. 473, 59 N. W. 1103; Gold-Stabeck Loan, etc., Co. v. Kinney, 33 N. D. 495, 157 N. W. 482, and 66 C. J., § 148, pp. 220, 221.

The above authorities declare a rule stated in the case of Smith v. Parsons, supra, as follows: "When the agreement exacts from the borrower a 'bonus' to be paid to the lender for making the loan, that, on the question of usury, must be taken out as of the date when it is to be paid by the terms of the agreement. If payable at the time of advancing the loan, it is for the purpose of determining what rate of interest the agreement reserves to the borrower, to be deducted as of that date from the amount of loan nominally agreed on, and the computation of interest made on the remainder."

Making the illustration concrete, in the instant case the calculation, based on a yearly and not a monthly payment of interest, would be roughly: Interest upon the principal of $161,370 ($172,000 less the condemned items of $9,030 and $1,600), at 12 per cent. per annum for a period of five years, would be $96,822, which, added to said principal, makes a total sum of $258,192. However, calculating interest as called for upon the face of the note ($172,000 at 7 per cent. for five years, or $60,200) and adding such amount to said gross principal, $172,000, we reach a total of $232,000. Now compare these two totals. If the latter exceeded the former, the transaction would be usurious; if not, there would be no usury. On this basis usury was absent in the transaction before us and such method of calculation thus answers the objections urged by appellants.

The District Court of Appeal, in the case of Finley v. Wyatt, 113 Cal. App. 233, 298 P. 80, construed the said sections of the Usury Act in harmony with the rule here promulgated.

[5] But little need be said as to the propriety of foreclosure of the chattel mortgage and impounding of the rents under the cross-complaint in this action. This was clearly allowable under section 442 of the Code of Civil Procedure. Certain installments were due; plaintiffs were in default. Said instruments were independent security for the obligation of plaintiffs and provided for the relief granted. The causes of action alleged in the cross-complaint certainly grew out of the contract sued upon, and no possible reason can exist for denying defendants the right to set up such matters by said pleading, with a prayer for such relief as said instruments authorize.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; SHENK, J.

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1 Cal.2d 730

POSTAL TELEGRAPH CABLE CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 15025.

Supreme Court of California.
Nov. 1, 1934.
Rehearing Denied Nov. 30, 1934.

1. Master and servant 🔑371

To recover compensation under Workmen's Compensation Act, elements of injury arising out of and in course of claimant's employment and occurring while performing service growing out of and incidental to employment must all be present (Gen. Laws 1931, Act 4749, § 6).

2. Master and servant 🔑375(2)

Relation of employer and employee is suspended while employee is off duty and does not reattach until he resumes master's work, unless, by express or implied contract, relationship attaches under special circumstances before he reaches master's premises.

3. Master and servant 🔑375(2)

Injury to telegraph messenger while going from his home to his place of employment on his motorcycle *held* not one "arising out of and in course of the employment" or occurring while "performing service growing out of and incidental to his employment" within Workmen's Compensation Act (Gen. Laws 1931, Act 4749, § 6).

[Ed. Note.—For other definitions of "Arising Out of Employment," "Course

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

of Employment" and "Performing Service Growing Out of and Incidental to Employment," see Words & Phrases.]

LANGDON, J., dissenting.

In Bank.

Proceeding for compensation under the Workmen's Compensation Act by Charles Rudy Mahret, employee, opposed by the Postal Telegraph Cable Company, employer. To review an award of compensation by the Industrial Accident Commission, the employer brings certiorari.

Award annulled.

Prior opinion, 32 P.(2d) 1067.

Rehearing denied; LANGDON and THOMPSON, JJ., dissent.

Smith, Southwell & Smith, Sanborn H. Smith, and R. P. Wisecarver, all of San Francisco, for petitioner.

Everett A. Corten and Arthur I. Townsend, both of San Francisco, for respondents.

George Olshausen, of San Francisco, amicus curiæ.

Gibson, Dunn & Crutcher, of Los Angeles (by Edward E. Bacon, of Los Angeles, Ira C. Powers, of Los Angeles, of counsel), and B. E. Pemberton, Edmund D. Leonard, Ivan A. Schwab, Daniel W. Burbank, C. F. Laumeister, and Stanley Burke, all of San Francisco, amici curiæ for petitioner.

Bronson, Bronson & Slaven, John H. Painter, Pillsbury, Madison & Sutro, Jesse H. Steinhart, and John J. Goldberg, all of San Francisco, George L. Greer, of Los Angeles, Wyckoff, Gardner & Parker, of Watsonville, Cooley, Crowley & Supple, O'Connor, Fitzgerald & Moran, Hadsell, Sweet, Ingalls & Lamb, Redman, Alexander & Bacon, and Myrick & Deering and Scott, all of San Francisco, Neumiller & Ditz, of Stockton, and Gerald M. Desmond, of Sacramento, amici curiæ.

PRESTON, Justice.

This application for certiorari must be sustained, as will appear from a consideration of the fundamental limits set by the law establishing the workmen's compensation system (Act 4749, Deering's Gen. Laws 1931, p. 2272 et seq.).

Petitioner is the Postal Telegraph Cable Company, a corporation. Respondents are the Industrial Accident Commission and Chas. Rudy Mahret, who was in the employ of petitioner as a motorcycle messenger. Said employee was injured in a traffic collision at Geary street and Presidio avenue, San Francisco, on August 31, 1932, while going from his home at 1728 Anza street, along Geary street, to his place of employment at Van Ness avenue and Pine street in said city. He was traveling on his motorcycle, with side-car attachment in which was riding a friend whom he was taking to his place of employment.

Petitioner employed three classes of messengers; foot, bicycle, and motorcycle. Mahret furnished, fueled, maintained, and operated his own motorcycle, and was paid compensation for his services and for use of the machine in the sum of approximately $30 per week; there being no segregation of the respective amounts allowed to cover each of these items. He was furnished a uniform for which a charge of 6 cents a day was made against him. His hours were from 8 a. m. to 6 p. m., with an hour off for lunch. The employer furnished no place to house or garage the motorcycle. The custom of the motorcycle messengers was to ride their machines to and from work and garage them either at their homes or on nearby premises in whatsoever manner they desired. At the time he was injured, Mahret was on no special errand for petitioner, and he had not yet reached his place of employment where his duties were to begin. It may be fairly inferred that he was required to furnish and maintain the motorcycle for his use in messenger service, and, as above stated, his employer maintained no facilities for storing the car when off duty.

[1] Do these facts entitle the employee, under the act, to compensation for his said injuries? Section 6 thereof (Deering's Gen. Laws 1931, supra, page 2276) provides: "Liability for the compensation provided by this act * * * shall * * * exist against an employer for any injury sustained by his employees arising out of and in the course of the employment * * * in those cases where the following conditions of compensation concur: * * * (2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment."

Upon what basis can it be said that the injury here was one arising out of and in the course of the employment or occurring while the employee was "performing service growing out of and incidental to his employment"? These elements must all be present to authorize compensation. Enterprise Foundry Co. v.

I. A. C., 206 Cal. 562, 275 P. 432; Larson v. I. A. C., 193 Cal. 406, 224 P. 744; London G. & A. Co. v. I. A. C., 190 Cal. 587, 213 P. 977; California C. I. Exch. v. I. A. C., 190 Cal. 433, 213 P. 257; Glass on Workmen's Compensation, p. 232; Willis on Workmen's Compensation, p. 9.

In the case of California C. I. Exch. v. I. A. C., supra, at page 436 of 190 Cal., 213 P. 257, 258, it is said: "There must be some connection between the injury and the employment other than the mere fact that the employment brought the injured party to the place of injury. There must be some causal connection between the employment and the injury in the sense that, by reason of the employment, there was an unusual or additional exposure of the injured party to the kind or character of hazard and danger (in this case an ordinary street risk) which caused the injury."

[2] When an employee is off duty, the relation of employer and employee is suspended and does not reattach until the employee resumes the master's work. It is true that this re-entry into service may occur under special circumstances before the employee reaches the premises of the master, but this can happen only where, by contract, express or implied, the relationship attaches at such earlier time. We need not pause to give examples of this exception.

[3] The contract here did not require of Mahret any particular means of travel to and from his place of service. Whether he used the motorcycle to transport himself from his home to his place of employment and return was of no concern to his employer under said contract. Likewise the question of whether he stored the machine at or near the master's premises or stored it at home or nearby is a false factor in the problem. The essence of the arrangement was that said employee report at 8 a. m. with a motorcycle ready for service; the service began at said place and at said time and not at a place and time when the employee was en route from his home and, as in this instance, many blocks away from the place of service.

This employee was on no errand for his employer, and was traveling under no restrictions of any kind as to mode or direction of travel. He could not only deviate for the convenience of his friend, but could also perform any task for himself or for another at any time before reaching the place where his duties were to begin. This holding is in accord with the overwhelming weight of authority where the principle involved is identical with that found in the instant case:

Some of these cases are: Grathwohl v. Nassau Point, etc., 216 App. Div. 107, 214 N. Y. S. 496, affirmed by the Court of Appeals 243 N. Y. 567, 154 N. E. 608; Thompson v. Glen Hill Gravel Co., 19 La. App. 854, 141 So. 797; Fidelity & Cas. Co. v. I. A. C., 79 Utah, 189, 8 P.(2d) 617; Morey v. City of Battle Creek, 229 Mich. 650, 202 N. W. 925, 38 A. L. R. 1039; Johnson v. State Highway Commission, 125 Me. 443, 134 A. 564; Denver & R. G. W. R. Co. v. I. A. C., 72 Utah, 199, 269 P. 512, 62 A. L. R. 1436; Hartford Acc. & Ind. Co. v. Lodes, 164 Okl. 51, 22 P.(2d) 361; Kneeland v. Parker, 100 Vt. 92, 135 A. 8, 48 A. L. R. 1396; Inland Gas Corporation v. Frazier, 246 Ky. 432, 55 S.W.(2d) 26; Chernick's Case (Mass.) 189 N. E. 800.

In fact, this case cannot be successfully distinguished from the case of Holopoff v. I. A. C., 131 Cal. App. 554, 21 P.(2d) 649. The only case to the contrary is Maryland Casualty Co. v. Smith (Tex. Civ. App.) 40 S.W.(2d) 913. Counsel assert that it is distinguishable from the case at bar upon the wording of the statute of Texas (Vernon's Ann. Civ. St. art. 8309, § 1), which provides: That the words "injury sustained in the course of employment" shall include "all other injuries of every kind and character having to do with and originating in the work, business, trade or profession of the employer received by an employee while engaged in or about the furtherance of the affairs or business of his employer whether upon the employer's premises or elsewhere." See American Indemnity Co. v. Dinkins (Tex. Civ. App.) 211 S. W. 949; also, Federal Surety Company v. Ragle (Tex. Civ. App.) 25 S.W.(2d) 898. But we need not consider the strength of this claim, although the contention seems to be recognized by the Texas courts. We prefer to rest our conclusion upon the proper construction of our own statute, steadied by the fact that statutes using the identical language of our own have been uniformly construed as not covering cases of the character of this one.

Again, to sustain respondents' claim would be to admit a liability of the employer for the torts of the employee committed while off duty. This identical question was before the Supreme Court of Washington in the case of Carroll v. Western Union Tel. Co., 170 Wash. 600, 17 P.(2d) 49, and it was there held under circumstances in all essential respects identical with those of the instant case that as a matter of law the employer was not liable.

The award is annulled.

We concur: WASTE, C. J.; SHENK, J.; SPENCE, Justice pro tem.

LANGDON, Justice.

I dissent. This case has had a somewhat chequered career. In the proceeding before the Industrial Accident Commission, compensation was awarded to the respondent employee. An application for a writ of review was denied by the District Court of Appeal, First District, Division 1, without opinion. A hearing was granted in this court, and our decision was rendered May 17, 1934, affirming the award; no dissent being filed. A petition for rehearing was nevertheless granted on June 15, 1934, and the court now, in an opinion signed by four justices, annuls the award. Justices THOMPSON and SEAWELL, who participated in the original decision, were not present at the oral argument on rehearing, and hence are disqualified from participating in the present decision. Justice CURTIS is absent. Justice SPENCE of the District Court of Appeal is at present a justice of this court pro tem., and his signature is necessary to make this a majority opinion. On this important case, therefore, the latest decision appears to be influenced largely by the temporary and fortuitous change in the personnel of the justices qualified to pass upon it.

I am convinced that the original disposition of the cause was proper, and I adopt as my dissent the former opinion of this court, reading as follows:

"This is a petition by an employer to review an award of the Industrial Accident Commission. Charles Mahret, the injured employee, was hired as a messenger boy, to deliver telegrams for the Postal Telegraph Cable Company at its branch office at Pine street and Van Ness avenue in San Francisco. He used a motorcycle, which he owned and maintained himself. On the morning of the accident, he was driving to work in the machine, and was struck by a street car, sustaining injuries. The commission found that the accident occurred in the course of, and arose out of, the employment, and gave its award of compensation, based upon weekly earnings of $30.

"Petitioner attacks the award chiefly on the ground that the case is governed by the 'coming and going rule,' that is, that injuries sustained by an employee on his way to work, or returning from work, are not compensable. Recognizing that this rule is subject to exceptions, as where the employee is compelled to use a particular method of transportation as incident to his employment, petitioner contends that no such exception is established here. It is said that the company pays a fixed rate per message for delivery thereof, and employs foot, bicycle, and motorcycle messengers, and that it is optional with the employee whether he delivers a message on foot or uses the mechanical methods of transportation.

"The record does not support this position. The testimony clearly shows that the company hires all three classes of messengers, but that, after being hired, a messenger is placed in one of the classes, and is assigned to an office where his services can be effectively used. Messengers without machines are placed in offices in the business district; motorcycle messengers are assigned to the more outlying districts. Thereafter, in the absence of some emergency, the messenger must appear equipped to do the work in the place to which he is assigned. Mahret was hired as a motorcycle messenger, and was required to report for work each day with his machine.

"This fact alone would not, of course, take the case out of the 'coming and going rule.' But the record also establishes without conflict the fact that no facilities for storage of the machine were afforded by the company, so that Mahret was forced to make his own arrangements for garage and maintenance. The case, then, is one where the nature of the employee's work compels him to drive to and from work with the machine, unless he pushes it before him. Are injuries received during such driving compensable? We think that they are. The risks to which the employee is subject are a result of the employment, and the situation is essentially the same as where the employer furnishes transportation and compels the employee to make use of it. It is, of course, well settled that in the latter case, that is, where the employer furnishes and controls the transportation, the injuries received are compensable. Rader v. Keeler, 129 Cal. App. 114, 18 P.(2d) 360; Trussless Roof Co. v. Industrial Accident Comm., 119 Cal. App. 91, 6 P.(2d) 254; Dominguez v. Pendola, 46 Cal. App. 220, 188 P. 1025; Sylcox v. National Lead Co., 225 Mo. App. 543, 38 S.W.(2d) 497.

"A factual distinction between the instant case and those cited above, which is greatly stressed by petitioner, is that in the cited decisions the employer owned the means of transportation, while in the instant case the employee was the owner. But this distinction is immaterial in determining the right to compensation. This right depends upon the existence of a risk peculiar to the employment. Where, by express directions, or with the knowledge and acquiescence of the employer, the employee is compelled to make use of a certain method of transportation, the risk involved in its use is one which results from the employment, and it can make no difference whether the vehicle is owned by the employer, the employee, or a third party; nor can it make any difference whether it was operated by the employer, the employee, or a third party.

"A case directly in point is Maryland Casualty Co. v. Smith (Tex. Civ. App.) 40 S.W.(2d) 913. There the employee, hired to deliver parcels, was required to furnish his own motorcycle, but was given no place to store it, and consequently had to keep it himself. He was injured on his way to work, and the court affirmed an award of compensation. Petitioner suggests that differences in the terminology of the Texas and California Workmen's Compensation Statutes may account for the decision, but we are unable to see wherein the general language of the Texas Act, * * * authorizing compensation when the employee is 'engaged in or about the furtherance of the affairs or business of his employer,' is broader than that of our own. It may be observed that the opinion in the Maryland Casualty Company Case relies for its basic governing principles upon a Minnesota decision, Novack v. Montgomery Ward & Co., 158 Minn. 495, 198 N. W. 290, and the statutory language therein considered was the same as that found in the California Act; that is, compensable injury must occur 'in the course of employment' and must 'arise out of it.'

"The Industrial Accident Commission of this state has previously indicated its approval of this exception to the 'coming and going rule,' even where the employee uses his own machine. Hartford Acc. & Ind. Co. v. Industrial Accident Comm., 17 I. A. C. 162.

"Petitioner places great reliance upon the case of Holopoff v. Industrial Accident Comm., 131 Cal. App. 554, 21 P.(2d) 649. There the employee was a delivery boy using his own motorcycle, and was injured on his way to work. The commission denied compensation, and its decision was affirmed. The case bears some resemblance to the instant case, but upon full consideration we do not deem it conclusive. The main point with which the court was concerned was whether the employee had deviated from his regular route on the morning in question on an errand for his employer or for his private purposes. It appeared that he had called on a friend to deliver something to him. The court held that the deviation was for a private purpose, and that at the time the employee was not acting in the course of his employment. The court's general statement of the 'coming and going rule' is not significant, for nothing appears in the opinion to suggest that the employee was compelled, by the nature of his employment, to make his own arrangements to store his machine. This element is, as we have seen, the controlling consideration in the case before us. We are satisfied that the conclusion of the commission that the injuries of Mahret were compensable finds support in the record and in the law.

"The only other question is whether the commission properly awarded compensation based upon Mahret's gross earnings of $30 per week, or whether it should have deducted therefrom the cost of maintaining the motorcycle, amounting to $50 per month. The statute, section 12, subdivision b (St. 1917, p. 843, as amended by St. 1929, p. 553), provides that the average weekly earnings shall not include any sum which the employer may pay to the employee 'to cover any special expenses entailed on him by the nature of his employment.' It seems clear that Mahret was not paid any sum as special expenses. His earnings were $30 per week, and the fact that his job required him to pay for the upkeep of a motorcycle does not mean that his employer paid him the cost of such upkeep as 'special expenses.' The language of the act does not permit such deduction any more than it permits deductions for the cost of tools or clothes. This view is fully developed in Springfield Coal Mining Co. v. Industrial Commission, 291 Ill. 408, 126 N. E. 133, 22 A. L. R. 859, where, under a statute practically identical with our own, the Supreme Court of Illinois held that, where coal miners were compelled to equip themselves with drilling machines, shovels, lamps, carbide, powder, fuse, squibs, picks, wedges, sledges, and tool and supply boxes, but were paid at a certain rate per ton of coal mined, it was improper to deduct the cost of these articles from the gross earnings to determine the basis of a compensation award. There is, to be sure, a decided conflict of authority on this point. The opposite view is presented in Richards v. Central Iowa Fuel Co., 184 Iowa, 1378, 166 N. W. 1059. We are of the opinion that the rule of liberal construction in favor of compensation, declared in our statute, section 69(a) (St. 1917, p. 877), necessarily leads to the interpretation made by the commission."

1 Cal.2d 718

STANDARD BRANDS OF CALIFORNIA v. BRYCE et al.

S. F. 14894.

Supreme Court of California.
Oct. 31, 1934.

1. Venue ⚷5(5)

Where complaint alleged that defendants claimed damages against plaintiff for injury to defendants' property during erection of plaintiff's building, and alleged further that any liability therefor would rest on codefendant contractors, and sought declaration as to rights and liabilities and injunction to restrain defendants from commencing damage action, action *held* one "for injuries to real property" triable in county where property was situated (Code Civ. Proc. § 392, subd. (1).

[Ed. Note.—For other definitions of "Action for Injury to Property," see Words & Phrases.]

2. Venue ⚷5(5)

Whether place of trial is governed by statute making actions for injuries to real property triable in county where property is situated is to be determined by subject-matter of action as shown by complaint (Code Civ. Proc. § 392, subd. (1).

3. Venue ⚷5(5)

Complaint alleging that defendants claimed damages against plaintiff for injuries and encroachments in erection of building, and alleging that any liability for such injuries rested on codefendant contractors and praying for declaratory relief, *held* not to state cause for declaratory relief, as respects right of defendants to have action tried where land was situated under statute making actions for injuries to real property triable in such county (Code Civ. Proc. § 392, subd. (1).

4. Venue ⚷5(5)

Subject-matter of action and issues involved are determinable from facts pleaded rather than from title or prayer for relief, as respects question whether action is one for injuries to real property triable in county where property is situated (Code Civ. Proc. § 392, subd. (1).

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In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the Standard Brands of California against Hugh H. Bryce and Mary J. Bryce, and J. F. Barrett and another, as copartners, doing business under the firm name and style of Barrett & Hilp, in which defendants Bryce filed a cross-complaint. From an order granting a motion of defendants Bryce for change of place of trial, plaintiff appeals.

Affirmed.

Livingston & Livingston, of San Francisco, for appellant.

Milton Marks, of San Francisco, for respondents Barrett and Hilp.

Victor P. Showers and Walter S. Barrette, both of Los Angeles, for respondents Bryce.

SHENK, Justice.

The plaintiff commenced an action in the superior court in and for the city and county of San Francisco by filing a complaint praying for certain declaratory and injunctive relief, to which the defendants Bryce filed an answer and a cross-complaint. The defendants Barrett and Hilp also filed an answer. The defendants Bryce moved for a change of place of trial to the county of Los Angeles. The motion was granted, and from the order the plaintiff appeals.

The allegations of the complaint show that the plaintiff owns certain real property in the city of Los Angeles. The defendants Bryce own adjoining property. Under a contract with the plaintiff, the defendants Barrett and Hilp, copartners, erected a building on the plaintiff's property. In the course of construction thereof, certain excavating was done under the cottages on the defendant Bryces' lot, and a concrete ledge or shelf built which connected the cottages with the wall of the plaintiff's building. The plaintiff alleges that the defendants Bryce have notified it that their land and cottages have been injured by reason of that and other claimed encroachments and the excavations on the Bryces' land, and other matters not necessary to mention specifically, and that said defendants intend to and will assert claims for damages against the plaintiff and commence an action against it for the sum of $7,500. It is further alleged that, if there are any encroachments upon or injuries to said defendants' property, the liability is not that of the plaintiff but of the defendants Barrett and Hilp. The plaintiff seeks a declaration of its rights and duties with respect to the defendants Bryce and the defendants Barrett and Hilp, and in respect to the property of the defendants Bryce, and for a declaration that the liability for said claimed injuries, if any, is the liability of the defendants Barrett and Hilp and not of the plaintiff. It also asks for an injunction to restrain the defendants from commencing any action against it on account of the asserted claim of the defendants Bryce.

The ground of the appeal is that the motion for change of place of trial should have been denied because the action is not governed by section 392 (1) of the Code of Civil Procedure, and that the complaint shows that a cause for declaratory relief is alleged also against the defendants Barrett and Hilp, and that they were not joined as defendants solely for the purpose of having the action tried in the city and county of San Francisco, the place of their residence. Section 395, Code of Civ. Proc.

[1-4] Aside from other considerations, the court, on making the order for change of place of trial, properly concluded that the action was one "for injuries to real property." The plaintiff argues that, because it is not in the position of a party asking for damages for injuries to real property, and that all it desires is a declaration of absence of any liability on its part on account of the acts which are claimed to have caused the injuries to the real property of the defendants Bryce, the action is not one "for injuries to real property." Section 392 of the Code of Civil Procedure provides that "actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated: * * * 1. For the recovery of real property, or of an estate or interest therein * * * and for injuries to real property." Whether the place of trial is governed by this section is to be determined by the subject-matter of the action as shown by the complaint. Weygandt v. Larson, 130 Cal. App. 304, 19 P.(2d) 852; Donohoe v. Rogers, 168 Cal. 700, 701, 144 P. 958; 25 Cal. Jur. 855, 857, 907, 908. The principal question for determination under the facts disclosed by the complaint and the issues tendered by the allegations thereof is the liability of the respective parties for injuries to real property. The alleged injuries to the real property, therefore, must be deemed to be the subject-matter of the action, whether the action be brought by the person claimed to have caused the injuries, as in the present case, for the purpose of resisting the owners' asserted claim, or whether the owners bring the action on their claim in the first instance and the other party resists by defending it. This is so also for the reason that, although the plaintiff in form has attempted to allege a cause for declaratory relief, nevertheless the facts alleged by it reveal that it is not entitled to any such relief, because it has not in fact alleged any such cause. The injury to the real property having occurred, it may be said that the only cause alleged by the complaint is the cause of action which the defendants Bryce are alleged to claim against the plaintiff. The subject-matter of that cause of action is the tort, viz., the injury to the real property of the Bryces located in Los Angeles county. The only distinction between the action as stated by the plaintiff and the action as it would have been stated had the defendant sued is, as noted, that the person claimed to have caused the injury, instead of the owners of the property claimed to have been injured, is suing as the plaintiff. The action is not, therefore, declaratory in character, but in fact presents essentially the same issues which would be involved upon a determination of the cause of action which the complaint shows has already accrued, viz., the liability of the respective parties by reason of the acts and conduct claimed to have caused the injuries. The subject-matter of an action and the issues involved are determinable from the facts pleaded, rather than from the title or prayer for relief. Luckey v. Superior Court, 209 Cal. 360, 366, 287 P. 450, 452, citing 1 Freeman on Judgments, § 366. When, as here, the cause of action has already accrued and the only question for determination is the ultimate liability of one party on account of consequential relief to which another is shown to be entitled, it has been held that the nature of the action is not a cause for declaratory relief, but is defined by the subject-matter of the accrued cause of action. See In re Sterrett's Estate, 300 Pa. 116, 150 A. 159, 162; Kaaa v. Waiakea Mill Co., 29 Haw. 122, 127, 128; see, also, notes in 12 A. L. R. 74–76; 50 A. L. R. 43, 44; 68 A. L. R. 119. These considerations are applicable as well on the questions of the nature of the action and the subject-matter of the complaint in determining the defendant Bryces' motion for a change of place of trial. Consequently, the plaintiff, by bringing the action itself in anticipation of the defendant Bryces' claim against it, and by joining other defendants upon whom it attempts to fasten the claimed liability and who reside in a county outside the county where the real property is situated, may not deprive the owners of the property of their right to a trial in the county where the real property is located. The plaintiff may not, by this device, choose its own forum and thus evade the statutory provisions which require a trial in Los Angeles county of any cause of action shown by the complaint to have accrued.

The order is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.

BRIX v. PEOPLE'S MUT. LIFE INS. CO.*

S. F. 15134.

Supreme Court of California.
Oct. 31, 1934.

Rehearing Granted Nov. 20, 1934.

1. **Courts** ⇨472(6)

Count for recovery of $400, the amount of accrued installments on accident policy, *held* to state cause of action within exclusive jurisdiction of municipal court.

2. **Pleading** ⇨54

Defect in one count of complaint cannot be supplied from statements in other counts, unless such statements are expressly referred to and made part of such count.

3. **Courts** ⇨472(3)

Superior court has exclusive jurisdiction of actions for declaratory relief (Code Civ. Proc. § 1060).

4. **Action** ⇨6

In action for declaratory relief, plaintiff may ask for declaration of his rights and also for any affirmative or consequential relief to which he is entitled under facts alleged (Code Civ. Proc. § 1060).

5. **Courts** ⇨472(6)

Where plaintiff sought to recover four monthly $100 payments accrued under accident policy at commencement of action, cause of action *held* within exclusive jurisdiction of municipal court, and fact that plaintiff, in same count, also asked for declaration of rights under policy, determination of which was necessary to recovery of accrued installments, did not bring case within jurisdiction of superior court as action for declaratory relief (Code Civ. Proc. § 1060).

6. **Action** ⇨6
Insurance ⇨666

In action under accident policy providing for installment benefits during total disability, plaintiff is entitled to recover only accrued installments, and plaintiff's right may not be extended to recovery of future installments by resort to declaratory relief statute (Code Civ. Proc. § 1060; Civ. Code, § 3283).

7. **Insurance** ⇨237

Insurer's default in payment of accrued installments under accident policy does not work breach of entire contract, but affects only rights of parties as to benefits accrued.

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In Bank.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Arthur J. Brix against the People's Mutual Life Insurance Company, in which defendant filed a cross-complaint. Judgment for plaintiff, and defendant appeals.

Reversed, with directions.

Prior opinion, 29 P. (2d) 233.

A. B. Weiler and Niles C. Cunningham, both of San Francisco (Glensor, Clewe, Schofield & Van Dine, of San Francisco, of counsel), for appellant.

F. Eldred Boland and McCutchen, Olney, Mannon & Greene, all of San Francisco, and Newlin & Ashburn, of Los Angeles (William D. Gallagher, Jr., of Los Angeles, of counsel), amici curæ for appellant.

Samuel M. Samter and J. J. Posner, both of San Francisco, for respondent.

Stanley F. Davie, of San Francisco, and Eugene K. Sturgis, of Oakland, amici curiæ for respondent.

CURTIS, Justice.

This action was brought to recover on an accident insurance policy issued by the defendant in favor of the plaintiff. The policy provided that, in case the insured was accidentally injured and such injury "shall wholly and continuously disable the insured from performing any and every kind of duty pertaining to his occupation for one day or more, so long as the insured lives and suffers total loss of time, the Company will pay a monthly indemnity at the rate of One Hundred ($100) Dollars." The complaint is in two counts. The first count contains proper and sufficient allegations showing the execution and delivery of the policy of insurance; that, while said policy was in full force, the plaintiff suffered permanent accidental injuries of the character covered by the policy, specifying the nature of such injuries; and that said injuries had wholly and continuously disabled the insured from performing any and every kind of duty pertaining to his occupation. This count of the complaint continues and alleges the giving of notice of such injury to the insurer and the presentation by the insured to the insurer of proofs of loss as provided by said policy; that the insurer had paid four monthly payments of $100 each in compliance with the terms of said policy, but had failed and refused to pay any monthly indemnities for any month subsequent to the month of January, 1930, and that since said date no part of said monthly indemnities of $100 each had been paid. The

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⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 41 P.2d 537.

second count of the complaint in paragraph I thereof by reference makes the allegations contained in the first count a part of the second count and contains one additional paragraph designated as paragraph II, which purports to state a cause of action for declaratory relief under section 1060 of the Code of Civil Procedure. To the complaint and to each count thereof the defendant filed a general and special demurrer. It also demurred to the first count on the ground that the court had no jurisdiction of the subject-matter thereof. The demurrers were overruled, and the defendant answered. The trial resulted in a judgment in favor of the plaintiff in the sum of $1,300 and interest. The court also further adjudged: "That plaintiff have and recover from the defendant the sum of one hundred ($100) dollars per month commencing with the month of March, 1931 (the trial was had on March 23rd, 1931) during the rest and remainder of plaintiff's natural life." From the judgment, the defendant has perfected the present appeal.

[1, 2] The first contention of appellant is that the court erred in overruling its demurrer to the first cause of action on the ground that the trial court had no jurisdiction of the cause of action stated in said first count. This contention must be sustained. The allegations of the complaint, the substance of which we have hereinbefore set forth in some detail, simply state a cause of action on said policy of insurance to recover the sum of $400. The jurisdiction of such an action was exclusively in the municipal court of the city and county of San Francisco. There is no allegation in this count making any of the statements in the second count a part of the first count by reference or otherwise. If the second count contained any statement which might aid or help out the allegations of the first count, it could only be made a part of the first count by reference or by restatement. The rule is well established that, where a complaint consists of two or more counts, each count must state a cause of action in itself, and any defect therein cannot be supplied from statements in other counts unless such statements are expressly referred to and made a part of it. Hopkins v. Contra Costa County, 106 Cal. 566, 570, 39 P. 933.

The second count of the complaint consists of two paragraphs. Paragraph I refers to the allegations of the first count; thereby making the statements contained therein a part of the second count. Paragraph II contains allegations from which it might possibly be inferred that plaintiff desired some form of declaratory relief under section 1060, Code of Civil Procedure. It may be seriously questioned whether the second count of plaintiff's complaint is sufficient for that purpose. However, the plaintiff contends that, if his complaint in the respect just noted was insufficient in its inception, the defendant by its answer, and particularly in that part of his answer setting up a special defense, has cured such defect by pleading the matter omitted from the complaint. For the purpose of this action, we will assume that the plaintiff is correct in this contention, and that under his pleadings, as aided by the allegations of the answer, he might be, if otherwise entitled thereto, awarded declaratory relief. In its special defense, defendant alleges that, under the terms of said policy of insurance, said policy did not cover disability while the plaintiff was not continuously under the professional care of a licensed physician, and that plaintiff had not during the months mentioned in the complaint been under such care. In determining the merits of this defense, it would be necessary for the court to construe the terms of the policy of insurance.

[3-5] We have held that the superior court had no jurisdiction of the cause of action set forth in the first count of the complaint. The only difference between the allegations of the first count and those of the second count is that the latter count contains allegations relating to declaratory relief, which allegations we are assuming for the purpose of this action constitute a sufficient statement for that purpose. Does this additional allegation in the second count relating to declaratory relief take the case out of the jurisdiction of the municipal court and bring it within the jurisdiction of the superior court? The superior court has exclusive jurisdiction of all actions for declaratory relief. Code Civ. Proc. § 1060. In such an action, the plaintiff may ask for a declaration of his rights either alone or with other relief. It is competent, therefore, in all actions for declaratory relief, for the plaintiff to ask for a declaration of his rights and also for any affirmative or consequential relief to which he is entitled under the facts alleged. Has the plaintiff in his second count made out a proper case for declaratory relief? By an examination of the second count as made up by reference to the allegations of the first count, it will be seen that plaintiff seeks to recover from the defendant the four monthly payments of $100 each which had at the commencement of said action already accrued and which were then due plaintiff by the terms of said policy of insurance. It will thus be seen that the cause of action set forth

in said second count had already accrued at the commencement of said action, and said action was primarily, and we think exclusively, for consequential relief. The court, in order to determine whether plaintiff was entitled to consequential relief, necessarily must have declared the rights of the plaintiff under said policy of insurance. Having done so, and having determined the question of consequential relief, the entire controversy embodied in the action was at an end. There was no necessity and no occasion for any further order declaring the rights of the plaintiff under said policy of insurance as that question had already been disposed of by the court. The case was not therefore one for a declaratory judgment. Aetna Life Ins. Co. v. Bellos, 158 Tenn. 554, 13 S. W. (2d) 795, 14 S. W. (2d) 961, 68 A. L. R. 119, note. See, also, the case of Standard Brands v. Bryce (Cal. Sup.) 37 P.(2d) 446, this day decided, and the authorities therein cited. The cause of action set forth in plaintiff's second count of the complaint can be regarded in no other light than simply an action to recover the several amounts due on the policy of insurance sued on, and, as the aggregate of these amounts was less than $2,000, the exclusive jurisdiction of said action was in the municipal court of the city and county of San Francisco.

[6,7] Plaintiff makes the further contention, however, that he was entitled under the second count of his complaint not only to a judgment for the amount which had accrued under the terms of said policy, but in some manner, by reason of his allegations relating to declaratory relief, that he was also entitled to a continuing judgment for the sum of $100 per month during the rest and remainder of his natural life. This was evidently the view of the trial court as it rendered a judgment in accordance with this last contention of the plaintiff. Plaintiff maintains that this judgment was proper, and, if so, that the action was of such a nature as to lie within the jurisdiction of the superior court. That judgments for future payments under installment contracts, even without allegations for declaratory relief, have been upheld in certain jurisdictions, is apparent from a reading of the reported decisions of certain states, and particularly those from the state of Kentucky. Equitable Life Assur. Society v. Branham, 250 Ky. 472, 63 S. W. (2d) 498; Prudential Ins. Co. v. Hampton, 252 Ky. 145, 65 S. W. (2d) 980. The first of these two decisions was rendered without the citation of any supporting authority, but upon precedents afforded in cases of alimony and compensation under workmen compensation acts. The second of these cases was decided upon the sole authority of the first. We are not inclined to accept these decisions as decisive of the question involved herein. It seems that a clear distinction may be made between an action upon an insurance policy, or other contract payable in installments, and a claim for alimony or for compensation under the workmen compensation acts. The former are strictly actions on the contract, while the latter are predicated upon statutory enactments expressly empowering the court in one instance and the Industrial Accident Commission in the other instance to adjudicate future payments. Plaintiff also relies upon the case of Fleming v. Peterson, 167 Ill. 465, 47 N. E. 755, which at first blush would seem to support the trial court in the entry of the judgment herein. However, a closer study of that case shows that it was a suit in equity brought to enforce specific performance of a contract entered into by the parties therein. The plaintiff in said action had secured a divorce from the defendant and in the judgment in said action the defendant was required to pay her the sum of $125 per month. Subsequently the parties to said suit substituted for said judgment a contract whereby the defendant agreed to pay plaintiff the sum of $125 per month, payable quarterly, and plaintiff satisfied the judgment for alimony. The case was further involved by certain other provisions of said contract. The defendant made payments under the contract up to a definite date, and thereafter refused to comply further with its terms. Plaintiff then brought a suit in equity to enforce specific performance, which resulted in a decree of the court in her favor. This decree was affirmed on appeal. It is quite evident that that proceeding is so different from the instant case as to render it but slight, if any, authority supporting the judgment now under review. It is not necessary for us to distinguish the other cases cited by plaintiff. They are either, in our opinion, decided upon an erroneous principle of law, or they are based upon statements of fact so different from those involved in the present action as to render them of slight, if any, aid in the decision of any question now before us. This statement is applicable to two California cases cited by plaintiff: Newman v. Burwell, 216 Cal. 608, 15 P. (2d) 511 and In re Estate of Caldwell, 129 Cal. App. 613, 19 P. (2d) 9. The first of these actions was brought by the divorced wife of a decedent against the executor of the will of said decedent to establish a claim against said estate and to have impounded funds of the estate

sufficient to pay and discharge said claim. The claim was based upon a decree of divorce whereby the wife was awarded the custody of the minor child and the husband was directed to pay to the wife $50 per month until the further order of the court. The claim was for the maximum amount necessary to pay and discharge the monthly installment accruing since the decedent's death and which would thereafter accrue until such time as the child should reach her majority. A demurrer to the complaint setting forth the foregoing facts was sustained by the trial court, but this court reversed the judgment. No useful purpose is to be gained by a lengthy consideration of the differences between the facts in that case and those in the present action. We think it is apparent that the two cases differ so materially that the cited case is in no way parallel with the instant action and cannot be accepted as an authority in support of the judgment in the present action. The facts in the case of In re Estate of Caldwell, supra, were in all material respects like those in the case of Newman v. Burwell, supra. That case was decided on the authority of Newman v. Burwell, supra, upon the only point raised on appeal, and that was that the claim for the support of the minor child of the deceased did not abate with his death. We reiterate our former statement that these cases cited by plaintiff are not of material aid in the solution of the problem now before us.

Nor do we think that plaintiff's claim that he is entitled to a continuing judgment for unaccrued installments during the balance of his life is supported by section 3283 of the Civil Code, which provides that: "Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future." This section, in our opinion, simply refers to damages that may accrue in the future as the proximate result of the tort or breach of contract upon which the action is based. In the present action the breach of the contract was the failure of the defendant to pay the accrued installments. This default in the payment of these accrued installments did not work a breach of the entire contract, "the contract still subsists as to future benefits, and the default only affects the rights of the parties as to the benefit accrued. It is obvious that it does not work a breach as to the future benefits, since, as to such, the liability of the defendant has not become fixed, but remains contingent upon the condition of the plaintiff being such as to entitle him to demand them." Robinson v. Exempt Fire Co., 103 Cal. 1, 3, 36 P. 955, 24 L. R. A. 715, 42 Am. St. Rep. 93.

The authority most nearly in point to which our attention has been directed is the case of Green v. Inter-Ocean Casualty Co. decided by the Supreme Court of North Carolina and reported in 203 N. C. 767, 167 S. E. 38, 42. That was an action brought to recover installments which had already accrued on an insurance policy. Plaintiff claimed permanent disability and sued for unpaid installments and for declaratory relief. The jury found plaintiff to be permanently disabled, and the trial court granted judgment for the accrued installments and in addition for monthly indemnity (as provided in the policy) so long as the plaintiff should live. The Supreme Court modified the judgment by striking out the last provision of the judgment relating to unaccrued indemnity payments. In doing so the court used the following pertinent language: "The plaintiff mistakes the purpose of the Declaratory Judgment Act * * * in assuming that a judgment, in an ordinary controversy like the present one, comes within the provisions of said act. It is quite obvious from the complaint that this is an action to recover under an insurance policy, that the alleged cause of action had already accrued."

The books are filled with cases in which actions have been brought to recover upon insurance policies similar to the one here involved, in which the insured has attempted to recover judgment, not only for accrued payments, but has also sought an adjudication as to installments not yet due. While the decisions upon the right of the plaintiff in such character of actions to recover for installments which have not yet accrued are not entirely uniform, the great weight of authority is to the effect that, in such actions recovery cannot be had for any installments falling due in the future. We cite only a few of such cases: Robinson v. Exempt Fire Co., 103 Cal. 1, 36 P. 955, 24 L. R. A. 715, 42 Am. St. Rep. 93; Atkinson v. Railroad Employees' Mutual Relief Society, 160 Tenn. 158, 22 S. W. (2d) 631; New York Life Insurance Co. v. English, 96 Tex. 268, 72 S. W. 58; Bonslett v. New York Life Ins. Co. (Mo. Sup.) 190 S. W. 870; Commercial Cas. Ins. Co. v. Campfield, 243 Ill. App. 453; Metropolitan Life Insurance Co. v. Day, 145 Ga. 425, 89 S. E. 576; Mid-Continent Life Ins. Co. v. Christian, 164 Okl. 161, 23 P. (2d) 672; Metropolitan Life Ins. Co. v. Lambert, 157 Miss. 759, 128 So. 750; State Life Ins. Co. v. Atkins (Tex. Civ. App.) 9 S. W. (2d) 290; Green v. Inter-Ocean Casualty Co., supra, 203 N. C. 767, 167 S. E.

38; Garbush v. Order of United Commercial Travelers, 178 Minn. 535, 228 N. W. 148; Howard v. Benefit Ass'n of Railway Employees, 239 Ky. 465, 39 S. W. (2d) 657, 81 A. L. R. 375; Washington County v. Williams, 111 F. 801 (C. C. A. 8th Cir.). In Atkinson v. Railroad Employees Mutual Relief Society, supra, 160 Tenn. 158, 22 S. W. (2d) 631, 634, the court declared the law as follows: "While the benefit certificate issued to complainant constitutes an entire contract, the obligation thereby cast upon the society is severable, with a right of action accruing to the holder for each benefit installment payable and in default. (Citing authorities.) So it is generally held that, in an action at law for breach of a contract of insurance, payable in weekly or periodic installments, only those installments in default at the time suit was brought may be recovered." (Citing authorities.)

In Mid-Continent Life Ins. Co. v. Christian, supra, 164 Okl. 161, 23 P. (2d) 672, 675, the court stated the rule in the following language: "Under the authorities just cited, plaintiff would be entitled to recover in his cause of action for all benefits that had accrued under the insurance contract at the time of filing his suit. And could amend his petition to include such installments due up to the date of the amendment. But plaintiff could not recover for installments that were not due. The court could not determine how long said installments would continue to become due, because said matter is dependent upon the conditions of health of plaintiff and the date of his death."

Our own court in construing a by-law of a fraternal organization providing for weekly benefits to any member who from sickness or accident became unable to earn a livelihood stated the applicable rule as follows: "The right of plaintiff to this payment for any one week accrues at the end of that week, and he is entitled to sue immediately upon default in its payment. Such default, however, does not breach the entire contract; the contract still subsists as to future benefits, and the default only affects the rights of the parties as to the benefit accrued. It is obvious that it does not work a breach as to the future benefits, since, as to such, the liability of the defendant has not become fixed, but remains contingent upon the condition of the plaintiff being such as to entitle him to demand them. * * * But the breach being separable, as we have seen, and not entire, plaintiff is only entitled to recover those benefits accrued at the commencement of the action." Robinson v. Exempt Fire Co., supra, 103 Cal. 1, 3, 4, 36 P. 955, 24 L. R. A. 715, 42 Am. St. Rep. 93.

Practically the same question has been before the courts of the state in cases involving leases where the rent was made payable in periodical installments, such as monthly or quarterly. It has invariably been held that the breach or repudiation of the lease by the lessee does not operate at once to mature all the rent reserved in the lease and to enable the lessor to recover not only the installments already accrued but those to accrue in the future. Bradbury v. Higginson, 162 Cal. 602, 604, 123 P. 797; Oliver v. Loydon, 163 Cal. 124, 126, 124 P. 731; Jacoby v. Peck, 23 Cal. App. 363, 138 P. 104. The same ruling was made where recovery was sought on a promissory note payable in installments. Crossmore v. Page, 73 Cal. 213, 14 P. 787, 2 Am. St. Rep. 789.

We are satisfied that the foregoing authorities state the correct principle of law which should govern the decision of the instant case. They hold most convincingly that in the action here pending the plaintiff is entitled to recover on said policy of insurance only accrued indemnity installments, and that this right of plaintiff may not be extended to recover installments which have not accrued by resort to the declaratory relief statute of this state. The pending action then, as stated in the foregoing authorities, is simply one upon an installment policy of insurance for the recovery of those installments which had accrued at the date of the commencement of said action. It was not such an action as the superior court in which it was brought had jurisdiction. It was the duty of the court, therefore, instead of proceeding to the trial of said action, to transfer it to the proper municipal court. Nothing which we have said herein should be taken as holding that, in case of a transfer of said action and a retrial thereof in the municipal court, the plaintiff may not, after proper amendment to that end, recover all installments which have fallen due on said policy of insurance since the commencement of said action, provided that his total demand does not exceed the jurisdictional limit of the municipal court.

The judgment is reversed, with directions to the trial court to transfer said cause to the proper municipal court.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; PRESTON, J.

1 Cal.2d 759

PIERCE et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY, et al.

S. F. 15286.

Supreme Court of California.
Oct. 31, 1934.

In Bank.

Proceeding by Charles Pierce and others for a writ of prohibition, restraining the Superior Court of the state of California in and for Los Angeles County and Frank C. Collier, as judge thereof, from making any further orders in an action pending before it.

Peremptory writ granted.

See, also, 37 P.(2d) 460.

John C. Packard, Irl D. Brett, and S. E. Gramer, all of Los Angeles, for petitioners.

U. S. Webb, Atty. Gen., and L. G. Campbell and James S. Howie, Deputy Attys. Gen., for respondents.

W. H. Anderson, Jefferson P. Chandler, Isidore B. Dockweiler, J. Ray Files, Byron C. Hanna and Walter K. Tuller, all of Los Angeles, amici curiæ.

WASTE, Chief Justice.

It is ordered that the respondent superior court herein be and it is hereby prohibited from making or entering any judgment, order, or decree in the action pending in said court entitled, "The People of the State of California on the relation of U. S. Webb, Attorney General, Plaintiff, v. Paul O. Pate et al., Defendants," numbered 379410 in said court, adjudicating the status, or affecting the rights of any defendant in said action who has not been regularly served with summons or who has not been otherwise personally served with notice to appear or who has not appeared in said action.

Let a peremptory writ of prohibition issue accordingly.

LANGDON, Justice (concurring and dissenting).

I concur in the above order in so far as it prohibits the lower court from striking from the great register the names of electors who were not served and did not appear in the superior court proceeding. I dissent from the order because of its manifest failure to grant the full appropriate relief to which petitioners are entitled, namely, the prohibition of all further proceedings in the court below.

This is an application for an alternative writ of prohibition, to restrain the respondent superior court from making contemplated orders, the effect of which would be to deprive defendants and petitioners in an action pending therein of the right to vote at the general election on November 6, 1934.

However pure and patriotic the motives behind it, this proceeding should never have been commenced. It should have been stayed immediately by this court on application for the alternative writ of prohibition, in accordance with the uniform practice of this court. A peremptory writ of prohibition should now issue, restraining all further activities in the respondent court in this matter; and all orders heretofore made should be annulled. It is perfectly clear now that the action below is a sham proceeding and a perversion of court process, absolutely void, and it can have no effect other than to intimidate and prevent eligible voters from going to the polls. It outrages every principle of justice and fair play. In brief, it attempts, in a personal action in the superior court, to adjudicate and cut off the constitutional right to vote of over 24,000 defendants, without personal service of any kind upon said defendants and upon a purported service by publication of this mass of names, without addresses, and not even in alphabetical order, on a single occasion, in a newspaper of some 1,500 circulation.

It was admitted in open court by counsel for respondent that its order does not mean what it says. The respondent court now declares that, notwithstanding its threat to cancel all registration of defendants who failed to appear and answer before a date fixed, it will not prevent any of them who do not appear before it from voting at the November election. Counsel state that the effect of this order is merely a "challenge in gross" of the right of petitioners to vote. The proceeding, either as originally instituted by the Attorney General or as now interpreted by the respondent court, is admitted by the respondent to be and, in so far as the reported decisions show, is without precedent or parallel in this or any other state of the Union.

The proceeding is contrary to law, to good morals, and to sound statesmanship. It is contrary to law because the court has no jurisdiction over the subject-matter or the persons of the defendants. It is contrary to good morals because it will unjustly deprive citizens of the right to vote, many of whom have no actual notice that their rights are in any way questioned. It is contrary to sound statesmanship because it seeks to prevent large numbers of citizens of this state from freely expressing their will at the polls, without a proper or legal determination of their rights, thereby striking at the very heart of free government. It is, moreover, unnecessary, because the law as it now stands contains ample safeguards against fraudulent voting. There will not be one fraudulent vote cast in the state of California, if the facts concerning fraudulent registration are presented to the election officers, and they perform their duties as prescribed by law. The legal presumption is that these officers will do their duty.

I make no criticism of the activities of any citizen or group of citizens, in conducting investigations to discover false registrations. Whether official or otherwise in origin, such investigations are in the public interest. If the results of these efforts are made the basis of a challenge at the polls, they will fully accomplish their legitimate purpose. It is within the power of the election officers, and it is a duty inherent in their offices, to report to the district attorney cases of false swearing. It is safe to say that the challenged voter, with knowledge of these investigations, will not take the oath required of him and place himself in peril of criminal prosecution for perjury, unless he is able to justify his claim of right to vote. The election rolls should, of course, be purged of false registrations. The opportunity to do this has always been present and is still present. But the method prescribed by law should be followed, and the method of challenge set forth in the Political Code bears not the remotest similarity to the action taken by the court below.

There was no ground whatever to justify the invention of this unique and drastic equity proceeding. While I do not question the good faith of respondent court and counsel, it is clear that they have mistaken their remedy.

In times of stress, public excitement, and hysteria, this court, the highest tribunal in the state, must stand as a bulwark in protecting the rights of every citizen within its borders. Its duty is clear and it must not falter. If today, without due process of law, the vested right of the qualified citizen to exercise his franchise at the polls is taken from him, tomorrow, without due process of law, the vested right of ownership of property may be taken away. While the Constitutions of this state and of the United States stand, this court cannot permit such action.

On October 18, 1934, the action which is under review here was filed in the superior court of Los Angeles county, entitled "People of the State of California on relation of U. S. Webb, Attorney General v. Paul O. Pate" and others. Approximately 24,130 persons were named as defendants. The registrar of voters was also joined as a defendant. The plaintiffs alleged that defendants were guilty of fraudulent practices in obtaining registration and that the public interest required that their names be stricken from the election rolls. The prayer was that the court appoint a master with power to recommend deputies, to hear and determine the right of the various defendants to vote at the next general election; and that the court issue an order to show cause, directing each and every defendant to appear before these officers, and providing that the name of any defendant not appearing shall be stricken from the great register. No attempt was made to serve any of said parties, but the court, over the objection of counsel appearing as amici curiae, issued the order to show cause as prayed, directing defendants to appear on or before October 25, 1934, and ordering that all failing to appear should have their names stricken from the register and be restrained from voting. The court also directed that its order to show cause be published once in the Los Angeles Daily Journal, and that copies be posted in three public places.

Shortly after the rendition of the order to show cause, five of the said defendants, acting on behalf of themselves and the others in a representative character, filed this application for a writ of prohibition, charging that the contemplated action of the lower court will be in excess of its jurisdiction. The position of petitioners is sound; the court lacks jurisdiction, both of the subject-matter and the parties.

Jurisdiction of the subject-matter, the power of the court to consider the class of cases to which the particular cause belongs, is, of course, essential to the validity of any proceeding. Without it, the court's judgment is wholly void; and, unlike jurisdiction over the person, it cannot be conferred by any form of voluntary appearance or consent. Harrington v. Superior Court, 194 Cal. 185, 228 P. 15; 1 Freeman on Judgments (5th Ed.) 674, § 337.

The proceeding by the Attorney General purports to be brought under the general equity powers of the superior court. No provision for it is found in the statutes of this state, which, of course, govern our whole procedure, regardless of whether the form of the action was originally "equitable" or "legal." Hence the court is without jurisdiction unless it can be established that there is first, a serious wrong or evil which calls for judicial action; and, second, that existing statutes provide no procedure to remedy it, or, as commonly stated, that there is no adequate remedy at law. But the unverified document filed by the Attorney General, and labeled "Complaint for Injunction" makes no pretense of meeting this basic test. It alleges "that there is no plain, speedy, or any adequate remedy at law for the correction of said false and fraudulent registrations; that there is no practical remedy except through the interposition of a court of equity." Apart from the bald assertion of the pleader, repeatedly held insufficient (Streator v. Linscott, 153 Cal. 285, 95 P. 42), there is no showing whatever of absence or inadequacy of legal remedy, and, indeed, the complaint would convey the impression that no appropriate legal remedy for the alleged fraudulent acts exists at all. This is, of course, untrue; there are two legal remedies quite appropriate to the circumstances, and their adequacy is attested by the fact that the Legislature has written them into the statutory law of this state, to apply in precisely the situation presented in the complaint. One remedy is the action provided by section 1109 of the Political Code; an action by any person to compel the county clerk to cancel illegal or improper registrations. The other remedy is the challenge of the voter at the polls, by any elector of the county, followed by a summary determination by the election board of the legality of his registration and right to vote, as provided in sections 1230 to 1243 of the Political Code. In the case of each of these remedies, the Legislature has established a procedure adequate in all respects to provide a speedy determination of the issue. The sufficiency and appropriateness of these proceedings have never been questioned, and their practicability has been demonstrated by time and experience. A statutory grant of jurisdiction of this character should be exercised within the limits prescribed by the statute, and strictly in conformity therewith. Collier v. Carter, 100 Md. 381, 60 A. 104. It has been held in California that the county clerk has no power to cancel certificates of registration, or withhold them from use in an election, except as authorized by the appropriate sections of the Political Code. Pohlmann v. Patty, 33 Cal. App. 390, 165 P. 447.

This would seem to dispose of the suggestion made by members of this court that the proceeding below was, in fact, an action under Political Code, § 1109, and therefore within the court's jurisdiction. The proceeding, in the first place, does not purport to be brought under said section; secondly, it seeks an injunction and section 1109 authorizes no such relief; thirdly, section 1109 requires personal service on each defendant, whereas none was intended or attempted here. Counsel for respondents, fully aware of their failure to meet the requirements of said section, have strenuously insisted in briefs and oral argument that this is an entirely different proceeding, brought by the people of the state in their sovereign capacity. Accepting, as we must, their characterization of the action, let us examine the cases submitted to establish jurisdiction over it.

These are, without exception, inapplicable. Thus, in Gibson v. Supervisors of Trinity County, 80 Cal. 359, 22 P. 225, a bond election was contested on grounds of fraud. The opinion expressly states that there was no statutory procedure applicable, and that for this reason the court could inquire into it. In Pagosa Springs v. People (Patterson v. People), 23 Colo. App. 479, 130 P. 618, 627, a certain special election had been held and the result declared. The complaint alleged conspiracy by the judges of election to prevent qualified electors from voting, and other illegal acts. The court said that it could grant relief under its general equity powers, "there being no statutory provision for contesting the validity of an election under the local option statute." Wright v. McKinney, 287 Ill. 529, 122 N. E. 813, is a similar case. In Elkins v. Milliken, 80 Colo. 135, 249 P. 655, initiative petitions were fraudulently altered by the sponsors after signatures had been obtained, and it was held that the court had power to order the secretary of state not to place the measure on the ballot. The basis for equity jurisdiction was found where it appeared that the only other proceeding which the law provided was a protest before the secretary of state, who had no power to summon witnesses and hence could not establish the fraudulent character of the petitions. Thus it was a case of an absolute lack of adequate remedy at law. In Aichele v. People ex rel. Lowry, 40 Colo. 482, 90 P. 1122, petitioner, a taxpayer, alleged that the respondent county clerk and his deputies had unlawfully conspired to make false registrations, and the only relief asked was to prevent him from certifying to the judges of election the fraudulent and fictitious registrations which he and his subordinates had unlawfully made. In People ex rel. Attorney General v. Tool, 35 Colo. 225, 86 P. 224, 229, 231, 6 L. R. A. (N. S.) 822, 117 Am. St. Rep. 198, the complaint charged a conspiracy of judges of election to place false names on the lists; by threats of violence to prevent members of an opposing political party from serving as judges of election; by use of police officers and toughs to intimidate voters and prevent them from casting ballots; and with ballot stuffing and similar practices. It was held that the court could by injunction direct that the election officials comply with the law governing elections on pain of punishment for contempt. In Shaw v. Circuit Court, 27 S. D. 49, 129 N. W. 907, an election was held on the question of removal of a county seat, and was contested. The court held that it had jurisdiction to issue a temporary injunction to restrain removal of the county offices pending the outcome of the election contest. Boren v. Smith, 47 Ill. 482, is a similar case. Gilmore v. Waples, 108 Tex. 167, 188 S. W. 1037, dealt with the power of the executive committee of a political party to nominate a candidate for office, and the court merely construed and gave effect to a specific statute.

These are the authorities chiefly relied upon to establish the jurisdiction of the superior court over this extraordinary type of proceeding. In no case was the action brought against individual electors to cancel illegal registrations, or otherwise to determine their rights as voters; the suits were ordinarily against election officials, to make them obey the laws. In all the cases the court proceeded in accordance with statutory authority, except where there was no statutory provision at all governing the situation, and in those cases the court acted under its inherent equity power to prevent the consummation of a wrong which would otherwise go unredressed. The reasoning of this latter group of cases demonstrates their inapplicability to the situation before us, where a complete statutory procedure offering dual remedies exists. It follows that the lower court did not, by filing of the complaint, obtain jurisdiction over the cause. This being so, the orders made and contemplated are void, and are not binding or conclusive as to the rights of any defendants, regardless of whether they were served with summons or voluntarily appeared.

The second aspect of jurisdiction is that over the parties, and it is plain that the court had no personal jurisdiction over the defendants. Jurisdiction over the person is obtained by service of process in the manner prescribed by statute, or by voluntary appearance. Cal. Code Civ. Proc. § 416; see Chaplin v. Superior Court, 81 Cal. App. 367, 253 P. 954. How does the lower court justify its assumed jurisdiction in the present proceeding, in which personal service of process was not attempted? Counsel's argument is that the action was brought to determine the civil status of certain defendants and was therefore in rem; that in an action in rem, any reasonable constructive service ordered by the court is sufficient. Numerous cases are cited, and again none is in point, nor is either proposition correct.

Actions to determine personal status are in the nature of proceedings in rem, the status being considered a "res" within the territorial jurisdiction of the state of domicile. The example of divorce proceedings is most common. See Haddock v. Haddock, 201 U. S. 562, 26 S. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1; 17 Cal. L. Rev. 160. But the present action has not as its object the determination of a status. The right to vote in this state is granted, and the qualifications of voters are prescribed in our Constitution, article 2, § 1. The status of the voter, if we must call it that, is established by the Constitution, and not by legislative enactment. The Legislature has prescribed certain regulations by the registration laws, which must be followed before the voter having the constitutional qualifications can exercise his franchise. But registration is not an element which determines the status of a voter; he may be a qualified voter, though unable to vote in a particular election because improperly registered. Bergevin v. Curtz, 127 Cal. 86, 59 P. 312; Minges v. Board of Trustees, 27 Cal. App. 15, 148 P. 816. The present action, therefore, is not to determine status, but to cut off the personal right to vote on the ground of failure to conform to the statutory regulations governing the exercise of the right. This has none of the characteristics of a proceeding in rem, and it falls within the accepted definition of an action in personam, for it seeks "to bar some individual claim." Tyler v. Judges of Court of Registration, 175 Mass. 71, 55 N. E. 812, 814, 51 L. R. A. 433.

This conclusion was the basis of the decision in Ash v. Superior Court, 33 Cal. App. 800, 166 P. 841, wherein it was held that the person whose registration is sought to be canceled is a necessary party defendant in any action, and must be brought in by personal service of summons unless he appears voluntarily; and that even the mailing to him of a copy of an order to show cause why his registration should not be canceled could not confer jurisdiction over his person. The court declared (33 Cal. App. 804, 166 P. 841, 842):

"We may say here, as was said by the Supreme Court of New York in a similar case, that if the statute may be properly construed to give a judge the right to prevent any person from voting by striking his name from the register as under the existing law the names of voters must be registered for a specified period of time prior to an election, without adequate procedure to bring such person before the court, 'then the provision is of a sweeping and revolutionary character, and dangerous in the extreme. * * * Such a power, so construed, would be unconstitutional as to its exercise, would deny the right of suffrage granted by the Constitution of the state, and would leave the election * * * entirely within the power of state judicial officers.' In re Ward (Sup.) 20 N. Y. S. 606."

But even if the action were in rem, the second proposition stated by counsel, that in such an action the court may determine its own reasonable method of constructive service, is entirely unsound. They refer us to article 6, § 5, of the Constitution, giving jurisdiction in equity to the superior court; and to section 187 of the Code of Civil Procedure, providing that where jurisdiction is conferred on a court by Constitution or statute, any suitable process or mode of proceeding may be adopted, "if the course of proceeding be not specifically pointed out by this code or the statute." Of course, this proviso destroys the force of their contention, for section 187 is available only where existing statutes fail to provide a procedure and process. McKendrick v. Western Zinc Mining Co., 165 Cal. 24, 30, 130 P. 865. It should also be borne in mind that the constitutional provision above referred to "does not confer any rights on the parties; it merely designates the courts where such rights as they may have in equity shall be enforced. * * *" Estate of Barnett, 97 Cal. App. 138, 141, 275 P. 453, 455.

It has long been settled in practically every state in the Union that constructive service, unknown at common law, is wholly dependent upon statute. It is permissible only in the circumstances specified by statute, and can be valid only when in strict compliance with the express terms thereof. Columbia Screw Company v. Warner Lock Company, 138 Cal. 445, 71 P. 498; In re Tracey, 136 Cal. 385, 69 P. 20; 50 C. J. 496, § 105; 50 C. J. 497, § 106; 50 C. J. 502, § 114. In California, the Code of Civil Procedure, in section 412, sets forth the grounds upon which an order for publication of summons may be had; for example, that the defendant cannot, after due diligence, be found within the state, or has concealed himself to avoid service. The section requires that such facts appear by affidavit. Not only was there no affidavit in the present proceeding, but the unverified complaint does not even attempt to allege that any of the statutory grounds exist. The order for publication of summons was consequently void. And it was void for the additional reason that it did not provide for publication in the manner and for the period prescribed in section 413.

Turning to the cases cited by respondents, Moyer v. Peabody, 212 U. S. 78, 84, 29 S. Ct. 235, 53 L. Ed. 410, states the familiar truism that due process of law depends on the circumstances. The case was concerned with an insurrection, and the right to vote was not involved. In Huling v. Kaw Valley Railway & Imp. Co., 130 U. S. 559, 564, 9 S. Ct. 603, 32 L. Ed. 1045, there was a condemnation proceeding, and service by publication under statutory authority was held binding on the owner of the real estate. In Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 P. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199, the court considered the California statute providing for an action by persons in possession to establish title to real estate, where the records were destroyed by fire. American Land Co. v. Zeiss, 219 U. S. 47, 31 S. Ct. 200, 55 L. Ed. 82, dealt with the same statute. In Shepherd v. Ware, 46 Minn. 174, 48 N. W. 773, 24 Am. St. Rep. 212, the statute was concerned with adverse claims to property, and provided for publication of summons in cases of necessity where claimants were unknown. State v. Guilbert, 56 Ohio St. 575, 47 N. E. 551, 38 L. R. A. 519, 60 Am. St. Rep. 756, also deals with property. In Security Savings Bank v. State of California, 263 U. S. 282, 44 S. Ct. 108, 68 L. Ed. 301, 31 A. L. R. 391, the proceeding was to escheat bank deposits unclaimed for over twenty years. It was held that the statutory provision for service by publication was consistent with due process, the proceeding being quasi in rem. The court in Re Craven, 178 La. 372, 151 So. 625, 90 A. L. R. 973, held that disbarment of an attorney could be based on substituted service, where the matter was under the state Constitution governed by rules of court, and the rules provided for such service in cases where the accused concealed himself or could not be found. In re Holland, 96 Cal. App. 655, 274 P. 559, was a proceeding to revoke the license of an attorney, and it was held that jurisdiction was acquired by publication for the period specified in disbarment proceedings, where it appeared by affidavit that the attorney could not after due diligence be found within the state. United States v. Knight (D. C.) 291 F. 129, involved a suit to cancel a certificate of citizenship for fraud or illegality. It was held that service by publication was proper in cases where the defendant lived abroad. In short, the published summons in every case was authorized by established procedure, and in no case did the court itself determine, without reference to the controlling statutes, what type of service should be made.

Mention may be made here of the fact brought to our attention at the hearing that, after the application for the alternative writ of prohibition was filed, the lower court, on its own initiative, decided that post cards should be mailed to the addresses of the various defendants, apprising them of the order, and made a supplemental order to this effect. It appears also that several newspaper advertisements and news items calling attention to the suit were published; that five copies of the order to show cause were mailed to the chairman of the county central committee of each political party; and that a copy of said order was sent to each public school building in the precincts where names were questioned, for posting. What additional validity this fantastic method of notification can give to the previous illegal and void service is beyond my comprehension. Inasmuch as none of these forms of substituted service complies with our statutes, no jurisdiction can result from them under the principles already discussed. In particular, the insufficiency of mailed notices in a proceeding to cancel registration has been determined in Ash v. Superior Court, supra.

The orders of the court are, therefore, void for lack of jurisdiction over the parties defendant.

From the foregoing, the right of petitioners to the remedy sought a peremptory writ of prohibition to restrain the lower court from acting in excess of its jurisdiction in this matter, is clear. The writ lies to arrest judicial proceedings in excess of jurisdiction in all cases where there is no other plain, speedy, and adequate remedy. Cal. Code Civ. Proc. § 1103; Jardine v. Superior Court, 213 Cal. 301, 2 P.(2d) 756, 79 A. L. R. 291; Havemeyer v. Superior Court, 84 Cal. 327, 401, 24 P. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; see 22 Cal L. Rev. 537. There are, however, objections raised by counsel which may be briefly examined.

It was suggested at the hearing that even though it be conceded that the publication of summons did not confer jurisdiction over the persons of the defendants, nevertheless a writ of prohibition should not be granted for the reason that some defendants may appear (and some have appeared) before the court to submit to its jurisdiction. This assumes, of course, that there is at least jurisdiction over the subject-matter; but even making this assumption, the suggestion is untenable. In the leading case of Havemeyer v. Superior Court, supra, wherein the right to the writ of prohibition was exhaustively discussed, the opinion states that "it never was the law that a court having jurisdiction to issue the writ had any discretion to refuse it when demanded by the real party in interest bringing himself clearly within the law." 84 Cal. 327, 401, 24 P. 121, 140, 10 L. R. A. 627, 18 Am. St. Rep. 192. Petitioners filed their application in a representative character, on behalf of themselves and other defendants; the petition makes the necessary allegations to justify a representative suit under section 382 of the Code of Civil Procedure. See Jellen v. O'Brien, 89 Cal. App. 505, 264 P. 1115. All of the defendants who have not appeared in the court below are, through the representation of these petitioners, seeking to restrain the lower court from acting in a case where it has no jurisdiction over them. It is elementary that waiver of the objection of lack of jurisdiction by one defendant does not operate as a waiver of the objection by other defendants. Vian v. Hilberg, 111 Neb. 232, 196 N. W. 153. Hence petitioners and the other nonappearing defendants whom they represent are entitled to the issuance of the writ, and under the rule laid down in Havemeyer v. Superior Court, supra, this court has no discretion to refuse their demand. The contrary view would mean that every defendant asserting lack of jurisdiction over his person would be compelled either to waive the jurisdictional objection by making an appearance and submitting to a trial on the merits, or to waive his right to a trial on the merits by ignoring the court's order, and taking a chance that ultimately in some subsequent proceeding the order would be declared void. If the order were ultimately held valid, it would then be too late to secure a hearing on the merits. Must petitioners and the other defendants take this chance? We expressly held in Jardine v. Superior Court, supra, upon a full review of the authorities, that they do not have to do so.

The contrary view would, indeed, eliminate the writ of prohibition entirely as a remedy to prevent unlawful exercise of jurisdiction over the person, since it is possible in any case to say that the writ should not issue because the defendant may appear and waive his objection. Is it conceivable that the lower court, by its order to show cause, which gave less than ten days to appear, can hasten the illegal proceeding and by taking action with respect to some of the defendants preclude the others from securing protection of their constitutional rights by the only remedy available? The answer can be found in Havemeyer v. Superior Court, supra, page 390 of 84 Cal., 24 P. 121, 137: "* * * The operation of the writ of prohibition is excluded only in cases where the action of the inferior tribunal is completed, and nothing remains to be done in pursuance of its void order. If its action is not completed and ended, its further proceedings may be stayed; and, if it is necessary for the purpose of affording complete and adequate relief, what has been done will be undone.

"If this were not so, the inferior court, by proceeding expeditiously and arbitrarily, could defeat the remedy. * * *"

And further, on page 392 of 84 Cal., 24 P. 121, 137, the court says:

"If such proceedings, conducted with such precipitate haste, can deprive the injured party of a remedy to which he is clearly entitled, then our law must be lame and impotent indeed.

"But happily there is no foundation for the claim that an inferior court can, by mere haste and precipitancy, defeat the appropriate remedy for excesses of jurisdiction, at least in a case where it may be intercepted before its action is fully completed."

The other point made at the hearing comes as a fitting conclusion to this amazing proceeding. Counsel for respondent declare that the lower court does not intend to make any order which shall deprive any person of the right to vote, and they add that it has jurisdiction but does not intend to exercise it. What does this mean? The order to show cause states that any defendant not appearing, or failing to establish his right on or before October 29, 1934, shall have his name stricken from the great register, and shall be enjoined and prohibited from voting. The amended and supplemental order states that such defendants may be enjoined and prohibited from voting "by a subsequent order to be made hereafter" by the court. On the record there are orders of the court, inconsistent it is true, but each indicating an intention to adjudicate and determine the right to vote of all defendants in the action. Now counsel state, off the record, that the court will not do what the complaint asks it to do and what it said it would do in its order. But even counsel are not sure of what the court will do. One of counsel suggested that it would be "a provisional order" striking the name of the voter from the election rolls unless he appears before the judges of election and establishes his right to vote. Another frankly declares that he does not know what the judge will do, but thinks he has in mind a "challenge in gross." Thus, the election board would act as a court of appeal or review of the decision of the superior court. I had conceived the power of review as lodged in a different tribunal.

It is sufficient, I think, to point out that the right of petitioners to a writ of prohibition to correct excesses of jurisdiction cannot be defeated by counsel's hope. According to counsel now, it would appear that the whole proceeding below is a subterfuge, intended to frighten and coerce voters by raising the barrier of a legal action, and placing upon them the burden of searching the monumental black list of defendants to discover any attack upon their registration; but not contemplating any effective judicial determination. If so, it is an abuse of the process of the court, and should be dismissed.

The writ of prohibition which this court has granted does not constitute an effective bar, either to the present proceeding, or others threatened, and hence fails to grant petitioners the full relief to which they are entitled under the law of this state.

1 Cal.2d 759

PIERCE et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

S. F. 15286.

Supreme Court of California.
Nov. 2, 1934.

Rehearing Denied Nov. 28, 1934.

1. Elections ⚷112

State may proceed by equity action, instituted by Attorney General, in superior court to purge great register of fraudulent registrations of voters in county.

2. Attorney General ⚷7

Attorney General has power, in absence of legislative restriction, to file any civil action or proceeding directly involving state's rights and interests or deemed necessary by him to enforce state laws, preserve order, and protect public rights and interests.

3. Elections ⚷112

Statute authorizing "any person" to bring action in superior court to cancel fraudulent registrations of voters does not deprive Attorney General of power to bring similar action on state's behalf (Pol. Code, § 1109).

4. Elections ⚷112

Superior court *held* without jurisdiction of persons of defendants, not appearing nor served with summons or personally with orders to show cause in state's action to cancel their registrations as voters, in absence of statute providing for constructive or substituted service (Code Civ. Proc. § 412).

5. Process ⚷4

Jurisdiction of defendant's person must be obtained by personal service of process before finally adjudicating his rights, whether action be in rem or in personam, where no other service is provided for by statute.

6. Prohibition ⚷10(2)

Defendants, not regularly served with summons, nor otherwise personally served with notice to appear, and not appearing in state's action to cancel their registrations as voters for fraud, *held* entitled to peremptory writ of prohibition, restraining superior court from entering any order adjudicating their status or affecting their rights.

THOMPSON, J., dissenting.

In Bank.

Proceeding by Charles Pierce and others for a writ of prohibition, restraining the Superior Court of the state of California in and for Los Angeles County and Frank C. Collier, as judge thereof, from making any further orders in an action pending before it.

Peremptory writ granted.

John C. Packard, Irl D. Brett, and S. E. Gramer, all of Los Angeles, for petitioners.

U. S. Webb, Atty. Gen., and L. G. Campbell and James S. Howie, Deputy Attys. Gen., for respondents.

W. H. Anderson, Jefferson P. Chandler, Isidore B. Dockweiler, J. Ray Files, Byron C. Hanna and Walter K. Tuller, all of Los Angeles, amici curiæ.

PER CURIAM.

This is a proceeding in prohibition to restrain the respondent superior court from making any further order or orders in an action pending before it.

The action referred to is numbered 379410 in said court and is entitled: "The People of the State of California, on the relation of U. S. Webb, Attorney General, v. Paul O. Pate et al." The complaint was filed on October 18, 1934, and the action was brought for the purpose of canceling alleged fraudulent registrations of voters in Los Angeles county. Upon the filing of the complaint the respondent court issued an order requiring the defendants, some 24,000 in number, to show cause before a special master why their registrations should not be canceled. The court found that it was impracticable to serve the order to show cause personally upon the defendants and directed that, in lieu of such personal service, the order be published once in the Los Angeles Daily Journal, and a news item be inserted in the daily papers of the city that the defendants could ascertain whether they were sued by an inspection of the order to show cause on file at certain designated places. The present proceeding was commenced on October 22d by some of the defendants on behalf of all of them.

The return of the respondents is by way of demurrer for want of sufficient facts, and by answer which shows that on October 24th the court issued a supplemental and amended order to show cause requiring postal cards to be mailed to said defendants. Personal service of summons or other notice was not provided for and was specifically dispensed with. Certain of the defendants voluntarily appeared in said action and the court has announced its intention to proceed as to the defendants not personally served and who have not appeared, and adjudicate their right to vote at the general election to be held on November 6, 1934.

The petitioners herein attack the power of the respondent court to proceed in the pending action on the ground that the court has no jurisdiction of the subject-matter of the action and, if it has such jurisdiction, that it has no jurisdiction of the persons of the defendants who have not appeared and have not been personally served.

[1, 2] The right of the state to proceed by an action in equity in the superior court to purge the great register of fraudulent registrations may not seriously be questioned. It is one of the high prerogatives of the state to provide for and insure honest elections. Without this safeguard the liberties of the people and the stability of the government would be at an end. If, as we hold, the state may maintain such an action, the right of the Attorney General to institute it may not be attacked. The Attorney General, as the chief law officer of the state, has broad powers derived from the common law, and in the absence of any legislative restriction, has the power to file any civil action or proceeding directly involving the rights and interests of the state, or which he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights and interests. People v. Stratton, 25 Cal. 242; People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 4 P. 1152, 56 Am. Rep. 80; People v. Beaudry, 91 Cal. 213, 27 P. 610; People v. Oakland Water Front Co., 118 Cal. 234, 50 P. 305; 3 Cal. Jur. p. 561; 2 R. C. L. p. 918; 6 Cor. Jur. p. 812.

[3] The petitioners claim that the jurisdiction of the subject-matter is lacking because an identical remedy is afforded by section 1109 of the Political Code. That section provides that "any person" may bring an action in the superior court to cancel fraudulent registrations. The Attorney General asserts that the state is not "any person" as provided by that section. We have not been referred to any authority, and we have discovered none, that the state is so included, although the purpose of an action under section 1109 is the same as the pending action. But neither is the section to be construed as a restriction upon the broad powers of the Attorney General. The fact that a remedy is given to a private individual to institute such an action could not operate to deny the power of the Attorney General to bring a similar action on behalf of the state, which power exists independent of said section. We conclude that the respondent court has jurisdiction of the subject-matter of the action.

[4] But jurisdiction of the persons of the defendants who have not appeared and who have not been served with summons or who have not been served personally with the order to show cause, does not appear. The Legislature might provide for constructive or substituted service in such cases, as has been done in other states, but it has not done so. We must then look to the law of the state as to what service is necessary.

[5] Before the right of suffrage may be denied to an individual, he must have notice and an opportunity to be heard in the manner provided by law. Here the substituted service sought to be applied is not available, and jurisdiction of the person must be obtained in the usual manner by personal service or by substituted service of summons as provided in section 412 of the Code of Civil Procedure, before the rights of the litigant may be finally adjudicated. This is true under the law whether the action be in rem or in personam where, as here, no service is provided by the law of the state except by summons or by other personal service. Any order made in the pending action, though provisional, which would deny to any defendant the right to vote at the election on November 6, 1934, would be in effect a final adjudication of the right to exercise the elective franchise as to that election.

[6] The holding of the District Court of Appeal in Ash v. Superior Court, 33 Cal. App. 800, 166 P. 841, is directly applicable to this proceeding. There an elector sued under section 1109 of the Political Code to cancel alleged fraudulent registrations. The voters whose registrations were claimed to be fraudulent were not made defendants in the action. It was properly held that the registrants were necessary parties to said action, and that before they could be deprived of the valuable right to vote they must be regularly served with process. This is particularly true when the Legislature has not provided for some lawful method for substituted service. The peremptory writ of prohibition and order, heretofore issued, limited as follows, was therefore appropriate:

"It is ordered that the respondent superior court herein be and it is hereby prohibited from making or entering any judgment, order, or decree in the action pending in said court entitled, 'The People of the State of California on the relation of U. S. Webb, Attorney General, Plaintiff, v. Paul O. Pate et al., Defendants,' numbered 379410 in said court, adjudicating the status, or affecting the rights of any defendant in said action who has not been regularly served with summons or who has not been otherwise personally served with notice to appear or who has not appeared in said action.

"Let a peremptory writ of prohibition issue accordingly."

See concurring and dissenting opinion of LANGDON, J., on order of October 31, 1934, 37 P.(2d) 453.

IRA F. THOMPSON, Justice

I dissent. It is a fundamental prerequisite to the issuance of the high prerogative writ of prohibition that it be made to appear that the inferior tribunal is acting or is threatening to act in excess of its jurisdiction. This rule is so well understood that it does not require the citation of authority. However, reference may be had to Traffic Truck Sales Co. v. Justice's Court, 192 Cal. 377, 220 P. 306, and cases there cited. It is manifest that the rule is not met by petitioner in this case. It was not seriously contended that the respondent court had no jurisdiction of the subject-matter of the action and, indeed, I do not believe such argument could be logically advanced. It must be conceded that one of the paramount duties of a republican form of government is to assure its citizens that the channels through which the power of the people is exercised and their will made known shall be preserved pure and unimpaired by fraud or illegality. To deny the state the power to perform its duty in this regard is to confess its impotency to maintain its existence. According to the complaint filed in the court below, the great register contains the names of many thousand persons who are falsely and fraudulently registered; and that "thousands of fictitious names have been placed on the registration list by persons not lawfully entitled to vote, for the manifest purpose of unlawfully voting and unlawfully influencing the result of the said general election." It is further alleged that because of the "fraudulent and fictitious registration, the will of the majority of the lawfully registered and qualified electors, in their choice of candidates, will be defeated at the said general election" unless those falsely registered are prevented and restrained from voting thereat. In addition, it is alleged, among other things, that these people, claimed to be fraudulently registered, have given as their address one "which is a vacant and uninhabited lot" and have signed false and fictitious names as well as given "a false and fictitious address" and registered "at different times and places in numerous precincts under the same, or a fictitious name or names and given a fictitious place or places of residence within each precinct." The complaint sets forth that the state is without an adequate and practical remedy unless the court "enters its orders and decrees, enjoining the registrar of voters [who is made a defendant] from certifying the names of each and all of the other defendants named in the caption * * * to the election officers in their respective precincts." The prayer asks, in addition to other relief, that the registrar of voters "be directed to show cause why he should certify the names of each and all of said other defendants to the election officers of their respective precincts at the general election on November 6, 1934." In the return to the order to show cause it appears that the defendant Kerr, as registrar of voters, has made a formal appearance and "has submitted to the jurisdiction of the court."

In the case of People v. Tool, 35 Colo. 225, 86 P. 224, 227, 229, 231, 6 L. R. A. (N. S.) 822, 117 Am. St. Rep. 198, which it is true involved not only the registration of "many thousands of false, fraudulent, and fictitious names," but also a conspiracy among a majority of the election commission and election judges in each precinct to prevent a fair election, we find the enunciation of certain principles which, to my mind, are irrefutable. We there read: "The state, in its sovereign capacity, by the very terms of its being, is intrusted with powers and duties to be exercised and discharged for the general welfare, and for the protection of the rights and liberties of its citizens. In the exercise of these powers and in the discharge of these duties, it is not restricted in the remedies which it may employ. The interest of the state in a pure election is not limited to the protection which may be afforded by the punishment of those, through criminal prosecutions, who violate the laws relating to elections by padding registration lists, permitting repeating, and falsifying election returns. If a conspiracy of the magnitude charged, exists to commit frauds violative of the most sacred rights of the citizens of the state, then any attempt to prosecute and convict the wrongdoers would be futile. If, then, the state, in order to secure an honest election, should be limited to the prosecution and punishment of those who might be guilty of the frauds charged, the people of this commonwealth are at the mercy of those who have combined to commit these frauds. Government is not such a failure; the state is not so impotent. The result to be accomplished by a proceeding which the state may institute, rather than its character, constitutes the test of its power. It has the right to appeal to this court for a determination and exercise of its powers by an appropriate process, to prevent wrongs which, in its sovereign capacity, it is its duty to prevent. Certainly no good reason can be advanced why it is not as wise for the state, by means of a civil action, to prevent an offense, injuriously affecting its rights or the liberties of its citizens, as it would be to wait and punish, or attempt to punish, the offender for a crime after it has been committed.

"It is the undoubted duty of the state to preserve, pure and unimpaired, every channel through which powers are exercised necessary for the protection of the rights and liberties of its citizens. Deny this power and the supremacy of the state government is denied. The rights of citizens which will be impaired if the frauds threatened are committed, are of the most vital importance. If not prevented, then the interest of the state, as well as the interests of those whom it is bound to protect, will be injuriously affected. The power which the state may exercise in such circumstances is wholly independent of other remedies at law. It is the function of the Attorney General, by information, to protect the rights of the public, and in so doing he has the right to resort to the more lenient remedy of injunction to prevent wrongs against the public rather than wait until after their commission, and then seek to punish the wrongdoers. The bill discloses that certain of the respondents have entered into a conspiracy to commit the illegal acts charged. These acts will affect the entire state. Individuals cannot invoke the power of a court of equity to enjoin these acts, but the state, in its sovereign capacity as parens patriæ, has the right to invoke the power of a court of equity to protect its citizens when they are incompetent to act for themselves. The state is not bound to wait until the object of the illegal combination is effected which will deprive the people of their liberties, and constitutional rights, but may bring an action at once to prevent its consummation; and while the writ of injunction may not be employed to suppress a crime as such, yet when acts, though constituting a crime, will interfere with the liberties, rights, and privileges of citizens, the state not only has the right to enjoin the commission of such acts but it is its duty to do so. In re Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. Ed. 1092; Atty. Gen. v. R. R. Co. [35 Wis. 425], supra; State v. Houser, 122 Wis. 534, 100 N. W. 964; Atty. Gen. v. Blossom, 1 Wis. 317; Columbian Athletic Club v. State, 143 Ind. 98, 40 N. E. 914, 28 L. R. A. 727, 52 Am. St. Rep. 407; Louisville N. R. Co. v. Commonwealth, 97 Ky. 675, 31 S. W. 476; Commonwealth v. McGovern, 116 Ky. 212, 75 S. W. 261, 66 L. R. A. 280; People v. Truckee Lumber Co., 116 Cal. 397, 48 P. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183; In re Court of Honor, 109 Wis. 625, 85 N. W. 497. In the celebrated Debs Case, supra, Mr. Justice Brewer, after discussing the interest which the government had in the action out of which the proceedings for contempt against Debs arose, and having reached the conclusion that the government had a property right to protect, said: 'We do not care to place our decision upon this ground alone. Every government, intrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one, and the discharge of the other; and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court.' "

In the case of Aichele v. People, 40 Colo. 482, 90 P. 1122, it was alleged that the county clerk and his deputies had unlawfully conspired to corrupt an election and that in pursuance thereof "defendant and his deputies have permitted and allowed and made and caused to be entered upon the registration sheet and books in his office at divers times many thousand false and fraudulent registrations of persons not qualified to be registered in the several precincts of the county, and also of many fictitious names as persons entitled to be registered." The prayer was that the county clerk be enjoined from certifying the fraudulent and fictitious names to the election officials. The court said: "We do not see why a court of equity, in the exercise of its ordinary equitable jurisdiction, has not the same power to restrain a public officer from registering or certifying fictitious persons, or making or changing original registration after the time fixed by the statute, as it would have to prevent a public officer from entering upon public records false or forged instruments, or those which are not entitled to be placed upon record. At least, with respect to the allegation in the complaint that the defendant has knowingly and willfully made and entered upon the registration books the names of fictitious persons, and has made and is making original registrations and changing the same after the time fixed by law, there can be no question that it is within the power of a court of equity to prevent or render harmless such illegal acts, and, in doing so, it is in no sense supervising or controlling the conduct of an election."

It must follow from these declarations of the equitable principles, as well as from the natural sequence of reason, that the state has the undoubted power through the courts to purge its records of false and fraudulent registrations in order to prevent the consummation of an election fraud. We may admit for the purpose of argument that the court below has not acquired jurisdiction of the persons of those who have not appeared in answer to the order to show cause, but it has jurisdiction of those who have submitted to its jurisdiction by appearance, including the registrar of voters. That it does not necessarily follow, however, that in every case the court is without jurisdiction to make an order affecting the status or even the property of a person over whom the court has not acquired jurisdiction by the service of process, I desire in passing to call attention to the recent case of Nichols v. Superior Court (Cal. Sup.) 36 P.(2d) 380, wherein to prevent fraud we upheld the appointment of a receiver and an order for the payment of alimony pendente lite out of the property without the service of an order to show cause or summons on the defendant. However, it is not essential here that we go to that length in this case to establish jurisdiction.

Now let us assume, as we must in accordance with the allegations of the complaint that many persons have registered from vacant and uninhabited lots and from fictitious addresses, and that such facts are made irrefutably to appear to the court. Can it be successfully asserted that the court has not the authority to order the defendant registrar of voters not to certify such names to the election officials? It is a plain absurdity to argue that one registered from a "vacant and uninhabited lot" is a duly registered elector. It is equally obvious that he has no right to protect. I am supposing cases where it is palpable and unescapable that the registration is fraudulent and fictitious only, for the purpose of illustrating the fact that the court is not without jurisdiction to take some action. In the supplemental and amended order to show cause the respondent court has said that the names may be stricken from the great register. We cannot indulge the supposition that names will be stricken improperly, but must confine our thoughts to those whom it has the right to order the registrar of voters to drop. The case of Ash v. Superior Court, 33 Cal. App. 800, 166 P. 841, 842, although it is not the measure of the case here, because it is one brought by an individual under the express authority of section 1109 of the Political Code, recognizes the rule which I think is entitled to weight in this case. The District Court of Appeal, speaking through Mr. Presiding Justice Conrey, said: "There may be instances in which the action authorized by section 1109 of the Political Code may be prosecuted and a valid judgment rendered compelling the clerk to cancel registrations without bringing in as party defendant any person other than the clerk. This would seem necessarily to be so in case of the death of the person registered. But, whatever may be said of other instances of cancellation of registrations as provided by section 1106 of the Political Code, we think that the power of cancellation of a completed registration without notice to the person whose registration is sought to be canceled cannot be exercised arbitrarily and without notice under any of the circumstances included within the action now pending in the superior court."

Even as in the case of the death of the one registered, so must it be in the case of those who are registered from a residence which does not in fact exist.

In the case of Aichele v. People, supra, the action was against the clerk only.

Section 1109 cannot be used from which to argue that in a case brought by the state to purge its records, the name of the person sought to be removed must be made a party for several reasons. First, there is no such requirement in section 1109, although the court may in a proper case, such as the Ash Case, require it. Second, the section gives to an individual a right which, according to People v. Tool, supra, he would not have without the section, but which right, in the absence of statute, is lodged exclusively in the state.

Third, and lastly, if it were to be so construed, equity is not confined to a procedure of law which is inadequate.

Furthermore, under the prayer for general relief, the court has the jurisdiction, without interfering with the right of any duly registered elector, and in order to protect the state from fraud and to prevent its wholesale consummation, to take effective measures to prevent and to assure the citizens that illegal and fraudulent votes will not be cast. In People v. Tool, supra, in the exercise of its equitable jurisdiction the court went to the length of appointing two watchers in each of the precincts for the purpose of observing how the election was conducted. I know of no reason why the arm of equity may not reach to every precinct wherein it is claimed there are fictitious registrants for the purpose of securing an honest election. So do I read the Tool Case and so I think does conscience dictate.

It is evident, therefore, that the respondent court is vested with jurisdiction, and I cannot but feel it should be left free to exercise that jurisdiction. The peremptory writ should be denied.

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2 Cal.App.2d 171

WARREN v. WARREN.

Civ. 5253.

District Court of Appeal, Third District, California.

Nov. 10, 1934.

Divorce ⚷161

Refusal to set aside default judgment in divorce action *held* not abuse of discretion under evidence.

Evidence disclosed that the husband, who was 72 years old, brought the action for divorce; that he and his wife had been separated for 13 years, although for 10 of the 13 years they had lived in same house; that a daughter-in-law stated in an affidavit that the wife said that she would not contest the divorce action, which information the daughter-in-law committed to the husband; that husband's attorneys notified wife's attorney that they understood that wife would not contest the action, and that therefore they would take default judgment; that the wife's denial of such alleged consent was communicated to husband's attorneys; and that thereafter wife's attorney left for Europe and did not return until after default judgment had been taken.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by D. P. Warren against Kate Warren. From an order denying a motion to set aside default of defendant and judgment and interlocutory decree entered thereon in favor of plaintiff, defendant appeals.

Affirmed.

J. R. Wilder and J. Widoff, both of Los Angeles, for appellant.

Leland J. Allen, of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from an order denying a motion to set aside the default of defendant and the judgment and interlocutory decree entered thereon in favor of plaintiff.

Plaintiff and defendant are husband and wife. On January 9, 1932, plaintiff filed an action for divorce against defendant upon the ground of desertion. Summons was served January 12, 1932, default entered June 16, 1932, and the interlocutory decree entered July 5, 1932. On October 5, 1932, a motion, which is the basis of this appeal, was filed, to set aside the default, and after hearing thereon denied.

The facts as revealed by the affidavits of the parties disclose that, immediately upon being served, defendant called upon her attorney, who we may add is not the attorney who prosecuted this appeal. He immediately communicated with the attorney for plaintiff in an effort to adjust the differences between the parties. It was then understood that no default would be taken until counsel for defendant had been notified and given an opportunity to file an answer.

About May 20, 1932, the attorney for plaintiff telephoned to counsel for defendant and stated plaintiff had received information that defendant did not intend to contest the divorce action, and that it was satisfactory to her that plaintiff take judgment. When defendant was informed of this statement, she vigorously denied the same, which denial was communicated to the attorney for plaintiff. Thereafter, on May 28th, attorney for defendant closed his offices temporarily and went to Europe. Upon his return early in September, he found a letter from the attorney for plaintiff, under date of June 3, 1932, notifying defendant he intended to enter default of defendant, which had been done some two weeks thereafter. Counsel for defendant then moved to set aside the default, but under these circumstances we cannot say the judgment was procured by reason of surprise, inadvertence, and excusable neglect on the part of defendant, nor is there any evidence of abuse of discretion on the part of the trial court in refusing to set aside the default.

From the affidavits of plaintiff, it appears that the parties to this action had been separated some 13 years, although for approximately 10 years of that period they had lived in the same house. It appears also that plaintiff supported his family and educated their four children, and that defendant was, at the time of the hearing, living with one of the children. It further appeared that affiant had up to June 15, 1932, supported defendant, but on the last mentioned date he lost his position as an educator. Affiant is 72 years of age, and has no property and no income other than the $8 per month which he receives as remuneration as a private teacher. It also appears by affidavit of one Louise Warren, a daughter-in-law of plaintiff and defendant, that defendant told affiant that she (defendant) would not contest the divorce action filed by her husband, which information affiant committed to plaintiff, D. P. Warren.

We think sufficient appears from the record to justify the order of the trial court. The order appealed from is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

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2 Cal.App.2d 133

TILDEN LUMBER CO. v. PERINO.

Civ. 9447.

District Court of Appeal, First District,
Division 2, California.
Nov. 9, 1934.

1. Limitation of actions ⇨66(12)

Statute of limitations commenced to run immediately against demand note and barred note four years after its date (Code Civ. Proc. §§ 312, 337).

2. Time ⇨10(4)

Where date on which demand note was barred by four-year statute of limitations fell on Sunday, holder of note could commence action thereon on following Monday (Code Civ. Proc. §§ 312, 337).

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by the Tilden Lumber Company against M. Perino. From a judgment of dismissal, plaintiff appeals.

Reversed.

Cyrus B. King and Rupert R. Ryan, both of Oakland, for appellant.

O. H. Speciale, of San Jose, for respondent.

STURTEVANT, Justice.

The plaintiff has appealed from a judgment rendered by the trial court dismissing its complaint. The plaintiff's action was based on a promissory note. The defendant filed a demurrer in which it pleaded the statute of limitations. The demurrer was sustained without leave to amend. After notice given, the plaintiff did not ask leave to amend, and judgment was entered dismissing the complaint.

[1, 2] The plaintiff asserts that its action was filed on the last day, but that it was not barred. The note was delivered on August 27, 1929. It was payable on demand. The statute commenced to run immediately. Clunin v. First Federal Trust Co., 189 Cal. 248, 207 P. 1009. It would have run its full course in four years from and after the date of the note. Code Civ. Proc. §§ 312 and 337. Four years from that date would be August 27, 1933. But the date last mentioned fell on Sunday. Therefore the plaintiff had all day Monday to commence its action. The rule is stated in 23 California Jurisprudence at page 973 as follows: "Where the last day to commence an action * * * falls on Sunday or a holiday, the action may be brought * * * on the succeeding day." See, also, Mox, Inc. v. Leventhal, 89 Cal. App. 253, 264 P. 562; Branagh v. Chicago, etc., Surety Co., 39 Cal. App. 610, 179 P. 543. It follows that the action was filed in time and the demurrer should not have been sustained. The defendant cites and relies on Hibernia Savings & Loan Society v. O'Grady, 47 Cal. 579. That case was decided under a statute that has been repealed. Stats. 1861, c. 321. The other authorities he cites involved other statutes of this state or of other states. They are not helpful.

The judgment appealed from is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

ARMSTRONG et ux. v. WALLACE et al.*

Civ. 5170.

District Court of Appeal, Third District, California.

Nov. 8, 1934.

Rehearing Granted Dec. 8, 1934.

1. Charities 🔑45(2)

To determine whether private hospital conducted by corporation or society is charitable, it is necessary to look not only to articles of incorporation and by-laws, but also to method of conducting hospital.

2. Charities 🔑45(2)

In action against hospital for injuries allegedly sustained through failure of doctor and nurses to remove sponge after operation, evidence *held* to establish that hospital was charitable agency, and hence not liable for alleged negligence of nurses and doctor.

3. Hospitals 🔑7

Hospital, even if it were not charitable institution, was not liable for acts of nurse furnished by hospital to doctor, since nurses in the surgery room are under control of doctor during preparation and progress of operation, and doctor, and not hospital, is responsible for them.

◆

Appeal from Superior Court, Humboldt County; C. A. Paulsen, Judge.

Action by MacDougall Armstrong and his wife against Carl T. Wallace and the Sisters of St. Joseph of Orange. Verdict was returned for both defendants, and against plaintiffs, and an order was made granting plaintiffs a new trial as to both defendants, who then gave notice of appeal from order granting a new trial. On motion by plaintiffs to dismiss appeal or affirm order granting a new trial.

As to the Sisters of St. Joseph of Orange, order granting new trial reversed; and as to Carl T. Wallace, motion to dismiss appeal denied.

Nelson & Ricks, of Eureka, for appellant Carl T. Wallace.

Horace W. B. Smith and George A. Work, both of San Francisco, and Irwin T. Quinn, of Eureka, for appellant Sisters of St. Joseph of Orange.

John L. McNab, of San Francisco, M. H. Iversen, of Ukiah, and Frank Thompson, of Eureka, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

An action was brought by plaintiffs, husband and wife, against Carl T. Wallace, a physician and surgeon, and Sisters of St. Joseph of Orange, a corporation, operating a hospital, for injuries alleged to have been sustained by Maxine Armstrong, as the result of the alleged negligence of Dr. Wallace and the Sisters of St. Joseph, in the failure to remove a laparotomy sponge from Mrs. Armstrong upon the completion of an operation. After a trial before a jury, a verdict was returned in favor of both defendants and against plaintiffs. A motion for a new trial was presented and the motion granted as to both defendants, who then gave notice of appeal from the order granting a new trial, whereupon plaintiffs moved to dismiss the appeal or affirm the order granting a new trial.

In regard to the hospital, the record discloses that plaintiff Maxine Armstrong was under the care of Dr. Wallace and was sent by him to the hospital operated by the Sisters of St. Joseph, for an operation. Dr. Wallace gave instructions to the hospital to have the surgery prepared for the operation. The nurse in charge of the surgery was one of the sisters of the order, serving without pay. The surgical nurse, or the one who was immediately to assist in the operation, was not a member of the order. Both of the nurses were registered nurses. The hospital made a charge to Mrs. Armstrong for the use of the surgery.

As to the acts of negligence charged to the hospital, it is in substance alleged that the sponge furnished for the operation did not have attached a tape by which the sponges are more readily accounted for and located and also that the nurse in charge did not count the sponges used in the operation. The defense of the hospital was that it was a charitable institution and that it used due care in the selection of its nurses and particularly as to the nurse in question, and furthermore, it was not responsible for any alleged negligence of the nurses during the operation.

The order granting a new trial as to the hospital was on the ground of errors of law and insufficiency of the evidence to justify the verdict and was against the weight of the evidence. As to the status of the hospital the testimony discloses that the hospital is conducted by the Sisters of St. Joseph of Orange, a corporation, and the purposes for which the corporation is formed are, among others, "to acquire and maintain suitable and permanent convents * * * orphanages, hospitals and other charitable institutions * * *, to purchase, take, hold, lease, hire and own lands * * *, educational institutions, orphanages and hospitals, to issue diplomas at graduation * * *."

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*Rehearing granted. The motion as to appellant Carl T. Wallace, and the motion as to appellant Sisters of St. Joseph of Orange to dismiss the appeals or to affirm the order of the trial court are and each is denied.

For subsequent opinion see 47 P.2d 740.

No one in connection with the corporation receives any salary nor any individual profits, nor do the officers of the corporation receive any salary nor do they participate in any of the profits. The teachers receive a small compensation for their maintenance. The corporation also conducts schools throughout California and assigns sisters to these schools as teachers, who receive about $35 per month from the parish in the community where they are. This particular hospital was opened in Eureka in about 1920, having been previously operated as a hospital but had been closed for about four years prior to it being taken over by the Sisters of St. Joseph. The property was acquired through two members of the order, who had inherited certain timber lands, which they conveyed to Northern California Hospital Association, the owners of the property in question, who, in consideration of the timber land, conveyed it to the Sisters of St. Joseph of Eureka, the predecessor of the defendant herein. In order to renovate the property a public drive was made among the citizens of Eureka for the purpose of raising money to put the hospital in proper condition. The order has from time to time received other bequests used in meeting the hospital expenses and carrying on other educational work in Eureka.

In addition to the patients admitted on a pay basis to the hospital, it appears that it also received charity patients. There are from 23 to 25 sisters working at the hospital who receive no salary, but get their room and incidentals. They perform most of the work in the hospital and do most of the nursing. If there is anything left over after the operation of the hospital, it goes to the upkeep of the institution; young women are also accepted at the community of the Sisters of St. Joseph, where they are educated and then sent out to be teachers, or sent to other institutions for training in nursing.

[1, 2] To determine whether or not a private hospital conducted by a corporation or society is charitable, it is necessary to look not only to the articles of incorporation and by-laws, but also to the method of conducting the hospital. In re Estate of Dol, 182 Cal. 159, 187 P. 428; Stewart v. California Medical, etc., Ass'n, 178 Cal. 418, 176 P. 46. We are convinced after an examination of the record before us, both documentary and oral, that appellant hospital was a charitable agency, a conclusion supported by ample authority. Burdell v. St. Luke's Hospital, 37 Cal. App. 310, 173 P. 1008; Dingwell v. Seymour, 91 Cal. App. 483, 267 P. 327; Stonaker v. Big Sisters Hospital, 116 Cal. App. 375, 2 P.(2d) 520, 522; Ritchie v. Long Beach Community Hospital Association (Cal. App.) 34 P.(2d) 771.

As was said in the Stonaker Case, supra, where the action was brought against the surgeon, two nurses, and the hospital, for injuries alleged to have been sustained by the administration of an excessive amount of ether: "It appears without contradiction that the hospital paid no compensation to its constituents for services, and that it paid no dividends; that it was conducted for the good of the community, by a charitable organization known as the Big Sisters League, with the intent and purpose that if there was a surplus over and above the expense of carrying it, such surplus would go to the said league. There is no evidence of a relaxation of reasonable diligence in the selection of attendants. As we have observed, the respondent physician employed by appellant was not employed by the corporation, and was not charged with supervision of its mechanical apparatus. We think the case is governed by rules announced in Burdell v. St. Luke's Hospital, 37 Cal. App. 310, 173 P. 1008, that: 'Upon this showing the lower court was clearly correct in directing a verdict for defendant under the rule laid down in Thomas v. German Gen. Soc., 168 Cal. 183, 141 P. 1186, where it is said that: "Where one accepts the benefit of a public or of a private charity he exempts by implied contract the benefactor from liability for the negligence of the servants in administering the charity, if the benefactor has used due care in the selection of those servants." The fact that plaintiff paid the regular rates charged by the hospital for paying patients does not take the case out of the operation of this rule, for it is apparent that the rates were not charged with a view of making a profit from her, and the moneys received from paying patients were not in fact sufficient to meet even the ordinary operating expenses of the hospital, without considering any interest upon the amount invested in the buildings.'"

[3] Even should it have been found that appellant hospital was not a charitable institution, the hospital could not have been held liable for the acts of the nurse furnished by the hospital to the doctor, as it is the rule that during the preparation and during the progress of an operation the nurses in the

surgery are under the control of the doctor, and he and not the hospital is responsible for them.

The leading case upon this subject is Schloendorff v. Society of New York Hospital, 211 N. Y. 125, 105 N. E. 92, 94, 52 L. R. A. (N. S.) 505, Ann. Cas. 1915C, 581, holding the hospital was not liable for the conduct of a nurse furnished by it to the surgeon, to assist in the operation; the court, through Mr. Justice Cardozo, saying: "It is true, I think, of nurses, as of physicians, that, in treating a patient, they are not acting as the servants of the hospital. The superintendent is a servant of the hospital; the assistant superintendents, the orderlies, and the other members of the administrative staff are servants of the hospital. But nurses are employed to carry out the orders of the physicians, to whose authority they are subject. The hospital undertakes to procure for the patient the services of a nurse. It does not undertake, through the agency of nurses, to render those services itself. The recorded cases make no distinction in that respect between the position of a nurse and that of a physician (Powers v. Massachusetts Hospital [(C.C.A.) 109 F. 294, 65 L. R. A. 372], supra; Ward v. St. Vincent's Hospital, 78 App. Div. 317, 79 N. Y. S. 1004; Cunningham v. Sheltering Arms [135 App. Div. 178, 119 N. Y. S. 1033], supra; Hillyer v. St. Bartholomews Hospital, supra [(1909) 2 K. B. (Eng.)], at page 827); and none is justified in principle. If there are duties performed by nurses foreign to their duties in carrying out the physician's orders, and having relation to the administrative conduct of the hospital, the fact is not established by this record, nor was it in the discharge of such duties that the defendant's nurses were then serving. The acts of preparation immediately preceding the operation are necessary to its successful performance, and are really part of the operation itself. They are not different in that respect from the administration of the ether. Whatever the nurse does in those preliminary stages is done, not as the servant of the hospital, but in the course of the treatment of the patient, as the delegate of the surgeon to whose orders she is subject. The hospital is not chargeable with her knowledge that the operation is improper any more than with the surgeon's."

For the foregoing reasons we think the court erred in granting a new trial as to appellant hospital, the evidence and the law establishing the fact that appellant corporation was not liable.

As to the motion to dismiss or affirm the appeal upon behalf of Dr. Wallace, we believe the issues presented are of sufficient importance without going into an analysis of the issues to warrant the matter being fully presented, and for that reason the motion to dismiss should be denied.

It is the order, therefore, that as to appellant Sisters of St. Joseph of Orange, a corporation, the order granting a new trial is reversed, and as to appellant Carl T. Wallace, the motion is denied.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

1 Cal.App.2d 719

FOORMAN v. MYERS et ux.

Civ. 9157.

District Court of Appeal, First District,
Division 2, California.
Nov. 1, 1934.

1. Appeal and error 🔑1011(1)

Trial court's findings, supported by substantial evidence, on controverted facts, are conclusive on appeal.

2. Attorney and client 🔑104

Notice of unsanitary conditions on leased premises to lessor's attorney by counsel for tenants, who knew that real estate brokers were lessor's agents for care of premises and that attorney notified was her agent only for purpose of suing for rent, *held* not notice to lessor.

3. Principal and agent 🔑177(1)

Principal is affected by knowledge agent owes duty to disclose.

4. Principal and agent 🔑150(1)

Agent acts in principal's place only in matters committed to agent by principal.

5. Principal and agent 🔑178(1)

Agent's knowledge within limits of his authority must be deemed knowledge of principal.

6. Attorney and client 🔑104

Attorney, employed for special purpose of bringing suit, is not bound to disclose to principal knowledge of facts beyond scope of such employment and known to be within independent agents' authority.

Appeal from Superior Court, San Mateo County; Franklin Swart, Judge.

Consolidated actions by Sadie S. Foorman against Michael H. Myers and wife. Judgments for plaintiff, and defendants appeal.

Affirmed.

Alma M. Myers, of San Francisco, for appellants.

Edw. R. Solinsky, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff, in two consolidated actions, sought to collect from defendants unpaid rentals under a written lease which was executed January 28, 1930, for a term of two years commencing February 15, 1930, and ending February 14, 1932. The first action was commenced March 23, 1931, covering unpaid rent accrued on January 15, February 15, and March 15, which amounted to $525. The second action, commenced on February 23, 1932, was for unpaid rentals from April 15, 1931, to January 15, 1932, which amounted to $1,750. The trial court entered judgment for the plaintiffs in both cases—the sum amounting to $2,250 with interest and costs. Defendants have abandoned their appeal as to the first portion of the judgment covered by the action in the sum of $525, but contend that the second portion is erroneous and should be reversed.

The lease states in part that the lessees shall keep the premises in good repair "except roof and outside of dwelling"; that they shall make no alterations without the consent of the lessor; that they waive all right under section 1942, Civil Code.

Relying upon their claim of an unsanitary condition of the sewage system, defendants refused to pay rent for the months of January, February and March, 1931, and on April 3d they vacated the house, declaring that it was untenantable. There is dispute as to whether or not the house was untenantable. Dr. McLean, the health officer, declared that there was a pool of grease and dirt in the yard when he examined the premises around the 28th of March; that there was an odor there; and that since it was near the kitchen door he considered it a health menace and sent notices to both defendants and plaintiff. Other witnesses testified that the sewage was only waste water from the kitchen sink and had no odor. There is also conflict as to the cause of the condition complained of. Dr. McLean testified that the sewage system was obsolete and should be replaced. Mr. Lee, the plumber, who was called by defendants to clean the sump, testified that roots in the pipe caused the trouble and made it impossible to keep the sump clean. Other evidence was offered tending to prove that the difficulty arose from defendants' failure to keep the hopper and drain clean.

In December, 1930, defendants complained to plaintiff of the unsanitary condition of the drain from the laundry and plaintiff at that time had that condition remedied. There is also evidence of a general complaint made to Mr. Solinsky, attorney for the plaintiff, on March 21, 1931, in the form of an offer to compromise the claim for unpaid rent involved in the first action. As to complaints made directly to Mrs. Foorman and to Rochex and Rochex, her agents, there is a conflict of evidence. Mrs. Foorman stated that the first information she had was the receipt on April 1, 1931, of a notice from the board of health to abate the nuisance within ten days, and that she had the repairs made on April 3d. The defendants moved out four days after the notice was mailed. The agents testified that they had had no notice of the condition arising from the sink, and no complaint since that of December, 1930, relating to the laundry drain.

[1] The trial court found against the defendants upon all these controverted facts, and these findings are, of course, conclusive on this appeal. That there is substantial evidence to support these findings cannot be disputed; in fact, the evidence tends strongly to support the claim of plaintiff that the defects complained of were due to the carelessness of the tenants and that the complaints were made primarily for the purpose of affording the defendants an excuse to vacate the premises. In this respect the case is akin to Grace v. Croninger, 56 Cal. App. 659, 206 P. 130, where, under similar evidence, the court held there was no constructive eviction.

[2] Appellants state that the only question of law involved in the appeal is whether the notice to respondent's counsel of unsanitary conditions was notice to respondent which would require her to remedy the condition within ten days thereafter. The notice referred to is the letter of appellants' counsel addressed to respondent's counsel on March 21, 1931, in connection with the claim for rent then due. Throughout the period of the controversy the premises were in the hands of local real estate agents whom the appellants knew were acting as respondent's agents for all purposes relating to the care

of the premises. Other complaints had been made to these agents and through them the conditions were remedied. But no complaint was made to such agents or to the respondent covering the defect claimed to have existed in March, 1931. The parties knew that the attorney was an agent for the special purpose of suing for the unpaid rent. They also knew that the real estate agents were acting as agents for respondent in all other matters relating to the lease of the premises. Hence there is no ground for an inference of ostensible or implied authority.

[3-6] The rule is found in Restatement of the Law of Agency, § 275, p. 611, "the principal is affected by the knowledge which an agent has a duty to disclose." It is a settled rule of law that an agent acts in the place of his principal in those matters only which have been committed to him by the principal, and that knowledge of the agent within the limits of his authority is to be deemed knowledge of the principal. Atkinson v. Foote, 44 Cal. App. 149, 165, 186 P. 831. But appellants have not cited any authorities, and we have found none, holding that an attorney employed for the special purpose of bringing a suit is bound to disclose to his principal, knowledge of facts which are beyond the scope of his employment and are known to be within the authority of independent agents.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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1 Cal.App.2d 732

In re TROY'S ESTATE.

STREET v. REINCKE et al.

Civ. 9611.

District Court of Appeal, First District,
Division 2, California.
Nov. 5, 1934.

1. Attachment 🔑178

Lien of attachment on interest of residuary legatee in personal property of estate *held* not to cover cash subsequently obtained by conversion of realty, where no attachment was levied upon realty (Code Civ. Proc. § 542, subd. 2; § 561).

2. Attachment 🔑178

Attachment applies only to debts existing at time of levy, and its lien cannot cover after-acquired property.

3. Attachment 🔑184

Lien of attachment on interest of heir or legatee in estate does not lapse on expiration of three years from date of levy (Code Civ. Proc. §§ 542b, 561).

4. Action 🔑35

Where right exists at common law, statutory remedy is merely cumulative; but, where right is given and remedy is provided by statute, statutory remedy must be pursued.

◆

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Attachments by L. M. Reincke and the Credit Clearance Bureau on the interest of Beatrice H. Hanks in the personal property of the estate of John H. Troy, deceased, opposed by E. C. Street, trustee in bankruptcy of the estate of Beatrice H. Hanks, bankrupt. From a decree of distribution entered in the estate of John H. Troy, deceased, the trustee in bankruptcy appeals.

Decree modified.

Charles H. Patterson, of Oakland, for appellant.

Orrick, Palmer & Dahlquist and Fabius T. Finch, all of San Francisco, for respondents.

NOURSE, Presiding Justice.

This is an appeal from two designated portions of a decree of distribution entered in the estate of John H. Troy, deceased.

The appellant is the trustee in bankruptcy of Beatrice H. Hanks, who was the residuary legatee under the will of the decedent. In September, 1925, L. M. Reincke levied an attachment on all the interest of Beatrice H. Hanks in the personal property of said estate. In August, 1927, the Credit Clearance Bureau levied an attachment upon the same interest. In March, 1928, Beatrice H. Hanks was adjudicated a bankrupt. In April, 1928, the Credit Clearance Bureau obtained a judgment against Beatrice H. Hanks upon which execution has been issued. When the first attachment was levied the executrix had in her possession $2,600 in cash, all of which has been used in the payment of specific legacies and in the administration of the estate. After this levy but before the levy of the Credit Clearance Bureau, the real property belonging to the estate was sold and the proceeds thereof were in the hands of the executrix of the estate. Thus all the property in the hands of the executrix subject to distribution was the personal property consisting of the proceeds of the sale of the realty which had been left to Beatrice H. Hanks as residuary legatee. But none of this property had been converted into personalty at the time of the Reincke attachment.

Section 561 of the Code of Civil Procedure authorizes the attachment of the interest of a defendant in personal property belonging to the estate of a decedent. Such attachment shall not impair the powers of the representative over the property for the purposes of administration. In the decree of distribution delivery of such property shall be ordered to the officer making the levy, but such delivery shall not be made until the decree of distribution has become final. In approaching the questions presented on this appeal it should be borne in mind that though the decedent died in April, 1925, and the decree of distribution was not made until January, 1934, the parties concede that the delay was due to litigation involving the estate and was not in any way due to any lack of diligence on the part of respondents herein.

[1, 2] We cannot support that portion of the decree which relates to the lien of the Reincke attachment. The probate court found that when the attachment was levied the only personal property in the estate was the sum of $2,600 which was used in payment of specific legacies and in administration. Title to the real property had vested in Beatrice H. Hanks as residuary legatee upon the death of decedent, but no attachment was levied upon the realty. This could have been done under the provisions of subdivision 2 of section 542 of the Code of Civil Procedure. Martinovich v. Marsicano, 150 Cal. 597, 600, 89 P. 333, 119 Am. St. Rep. 254. This method, being statutory, is exclusive and, if not followed, no valid attachment of the realty exists. When the realty was converted into cash this became personal property which was not in the hands of the executor when the attachment was levied. As an attachment applies only to debts existing at the time of the levy (Norris v. Burgoyne, 4 Cal. 409), the lien of the attachment could not cover after-acquired property. This has been the accepted rule in this state for so many years that we need not consider authorities from other jurisdictions which, while not holding directly to the contrary, might support the argument for a different rule.

[3, 4] The portion of the decree relating to the lien of the Credit Clearance Bureau is not affected by the foregoing. The attachment was levied after the realty had been converted into cash, and the claim was reduced to judgment before distribution, and before Beatrice H. Hanks was adjudged a bankrupt. The only question raised by appellant relative to this portion of the decree is whether the lien of the attachment lapsed on the expiration of the period of three years from the date of the levy under the provisions of section 542b of the Code. Section 561 is a special statute dealing exclusively in the attachment of the interest of an heir or legatee in the personal property of an estate. It is the only authority under which the probate court may make distribution to one who is not an heir or legatee. Estate of Nerac, 35 Cal. 392, 95 Am. Dec. 111; Martinovich v. Marsicano, 137 Cal. 354, 357, 70 P. 459. This section provides that in the decree of distribution delivery of the property attached "shall be ordered to the officer making the levy," but that such delivery shall not be made until after the decree of distribution has become final. Before this section was enacted personal property in the hands of an executor was deemed to be in the custody of the law and as such not subject to attachment or execution. This section provided a remedy where none had theretofore existed and it laid down the procedure for making the remedy effective. In re Durel (C. C. A.) 10 F.(2d) 448, 450. Section 542b, which limits the life of an attachment lien to three years from the date of the levy, is a general provision enacted for the purpose of compelling diligence on the part of the attaching creditor. Jones v. Toland, 117 Cal. App. 481, 483, 4 P.(2d) 178. This reason does not apply where the attachment is levied upon the interest of an heir or legatee because the attaching creditor has no power to control the proceedings in probate. When the reason for the rule ceases the rule ceases and when a rule can be applied only by implication it should not be applied when there is no reason for it. There are many authorities holding that, where a right existed at common law, a statutory remedy is merely cumulative, but that, where the right is given and the remedy is provided by statute, the statutory remedy must be pursued. People v. Craycroft, 2 Cal. 243, 244, 56 Am. Dec. 331; Estate of Ward, 127 Cal. App. 347, 354, 15 P.(2d) 901. This respondent has strictly followed the remedy provided in the statute and we can see no reason why it should be denied the right because those over whom it had no control delayed the proceedings.

The decree is modified by striking the portion thereof relating to the claim of Reincke, and otherwise it is affirmed. The appellant should have his costs against respondent Reincke, the Credit Clearance Bureau to have its costs against appellant.

We concur: STURTEVANT, J.; SPENCE, J.

2 Cal.App.2d 203

REGENTS OF UNIVERSITY OF CALIFORNIA v. JOHNSON.

Civ. 5169.

District Court of Appeal, Third District, California.

Nov. 13, 1934.

Rehearing Denied Dec. 13, 1934.

Hearing Denied by Supreme Court Jan. 10, 1935.

1. Paupers 🔑48

Authorization for county board of supervisors to make contracts for care of indigent sick with hospitals in county by necessary implication excluded right to make contracts with hospitals outside county (Pol. Code, § 4041.16).

2. Paupers 🔑48

Liberal construction of statute so as to permit making of contract by county for operation on pauper by hospital outside county, contended for in interest of charity, was refused, since charity will not be conferred at expense of others over whose funds donors have no legal control (Pol. Code, § 4041.16).

3. Paupers 🔑48

Claim of hospital against county for operation on pauper at request of board of supervisors would be denied, since board had no authority either under Political Code or Pauper's Act to contract with hospital in another county for care of indigent sick (Pol. Code, §§ 4041.16, 4307, subd. 7; Gen. Laws 1931, Act 5814, § 1).

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Mandamus proceeding by the Regents of the University of California against F. H. Johnson, as auditor of the county of San Joaquin, state of California. From a judgment ordering writ of mandamus to issue directing respondent to draw a warrant on the treasury of the county of San Joaquin in payment of petitioner's claim, respondent appeals.

Reversed.

George E. Frioux, of Stockton, for appellant.

J. Leroy Johnson, of Stockton, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The auditor of San Joaquin county has appealed from a judgment directing a writ of mandamus to issue commanding him to draw a warrant on the treasury of that county in payment of a claim for $110.95 which was previously allowed by the board of supervisors for hospital services furnished by the petitioner at the request of the board. It is asserted the claim is illegal and that there is no authority of law to pay it from the county treasury.

F. H. Johnson is the auditor of San Joaquin county. The county maintains a general hospital at Stockton. Letha Patrick was an indigent person who resided in that county. Miss Patrick was taken to the hospital for treatment for a brain abscess. It became necessary to perform an operation to preserve her life. The San Joaquin Hospital lacked adequate facilities for a proper performance of the operation. The board of supervisors authorized the sending of this patient to the University of California Hospital at San Francisco for the performance of the operation. The last-mentioned hospital was fully equipped to perform the operation, and did so at the request of the board of supervisors of San Joaquin county. A claim for $110.95 for this service was presented to the board of supervisors and allowed. This claim was then presented to the auditor, who refused to pay it on the ground that it was an illegal claim not authorized by law. Upon application to the superior court of San Joaquin county, based upon the foregoing facts, a demurrer to the petition for a writ of mandamus was overruled and ten days were allowed the auditor in which to answer. The auditor refused to answer, and a judgment by default was thereupon rendered against him, in which it was ordered that a writ of mandamus issue directing him to draw his warrant upon the treasury of that county in payment of the claim. From that judgment, the auditor has appealed.

[1-3] We are of the opinion the board of supervisors of the county of San Joaquin is

not authorized by law to incur an obligation against the county for hospital or surgical services in behalf of an indigent person who resides in that county, to be furnished by a hospital outside of the county.

The authority of a board of supervisors to contract with a hospital for the care of indigent persons in emergency cases is confined by the provisions of section 4041.16 of the Political Code to "hospitals in the county or city and county" of which the board has jurisdiction. That section provides in part:

> "(1) Under such limitations and restrictions as are prescribed by law, and in addition to jurisdiction and powers otherwise conferred, the boards of supervisors, in their respective counties, shall have the jurisdiction and powers to provide for the care and maintenance of the indigent sick or dependent poor of the county, and for that purpose to levy the necessary property or poll taxes, or both; provided, that a suitable graduate or graduates in medicine shall be appointed to attend to such indigent sick or dependent poor in the county hospitals and almshouses; provided, further, that the board shall not let the care, maintenance, or attendance of such indigent sick or dependent poor by contract to any person; except that the board shall be authorized and empowered to secure by agreement for the needy sick and dependent and partially dependent citizens in cases of emergency, hospital care * * * from persons, firms and corporations then and there maintaining and operating hospitals in the county or city and county. * * *"

The foregoing statute is an express limitation on the power of the board to contract for the medical care of its indigent sick persons with "hospitals in the county." The statute specifically prohibits the board from letting "the care, maintenance, or attendance of such indigent sick," by contract to any institution "except * * * hospitals in the county." Even without the express prohibition against contracts for the care of the indigent sick with other institutions, on the doctrine of expressio unius est exclusio alterius, the authorization for the board to make such contracts with hospitals in the county, by necessary implication, excludes the right to make contracts with hospitals outside of the county. 59 C. J., p. 984, § 582; 25 R. C. L., p. 98, § 229. There may be good reason for this limitation. Otherwise the board might exercise its discretion in an emergency case by sending the patient to the Mayo Hospital in Minnesota, or elsewhere, because it assumed that better professional services might thereby be procured. It is suggested that in the interest of charity a liberal construction of the statute should prevail. Charity is commendable, but it should not be conferred at the expense of others over whose funds the donors have no legal control.

The respondent in this proceeding contends that the authority for the board to incur this expense may be found in the Pauper's Act of California (Stats. 1901, p. 636, and amendments thereto, Act 5814, § 1, Deering's Gen. Laws of California, 1931), and in section 4307 of the Political Code. Neither of these last-mentioned provisions authorizes a board to contract for the care of indigent sick, in emergency cases or otherwise, with institutions outside of its own county. These statutes must be read together with section 4041.16 of the Political Code, which limits the authority to contract for services and care of the indigent sick to hospitals in the county. The Pauper's Act provides in that regard:

> "Every county and every city and county shall relieve and support all pauper, incompetent, poor, indigent persons and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, or by their own means, or by state hospitals or other state or private institutions." Section 1.

Section 4307, subd. 7, of the Political Code, upon which the respondent relies, provides that:

> "The following are county charges: * * *
>
> "7. The necessary expenses incurred in the support of the county hospitals, almshouses, and the indigent sick and otherwise dependent poor, whose support is chargeable to the county. The board of supervisors may, in its discretion, authorize the payment of expenses incurred, by county authorities, for temporary, emergency, or extended care or treatment of indigent patients of such county, by local hospitals."

There is nothing in either of the two statutes last mentioned which, by implication or otherwise, extends the authority of the board of supervisors to contract for the care of indigent sick persons with institutions outside of the county. The Pauper's Act merely provides that a county shall care for its indigent poor and sick inhabitants. Section 4307 of the Political Code also limits the authority of the board to contract for the care or treatment of temporary emergency cases only with "local hospitals." The reading of these last-mentioned statutes, together with section 4041.16 of the Political Code, confirms the imperative conclusion that a board of supervisors has no power to contract for the care of the indigent sick with any hospital outside of its county. The claim against the county of San Joaquin was therefore unauthorized and illegal. It was the duty of the auditor to refuse to draw his warrant in payment of this illegal claim.

The judgment is reversed.

We concur: PLUMMER, J.; PULLEN, P. J.

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1 Cal.App.2d 365

SANFORD et al. v. GRADY et al.

Civ. 5064.

District Court of Appeal, Third District, California.

Nov. 10, 1934.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

On rehearing.

George R. Freeman, of Willows, for appellants Charles S. and Laura C. Grady.

Clark & Heafey, of Oakland, Chenoweth & Leininger, of Redding, and James W. Hughes, of Oakland, for appellants Gertrude and Richard Steger.

Jesse E. Nichols and Clifton Hildebrand, both of Oakland, for respondents.

PER CURIAM.

Upon petition for rehearing the opinion of this court, in 36 P.(2d) 652, is modified as follows:

At page 653 of 36 P.(2d), line 6 from the bottom, at the end of the line following the word "therein" insert: "although he had not traveled that road for four years he claimed that he did not remember the exact location of the depression. He said in that regard: 'I did not know it was so close.' "

At page 654 of 36 P.(2d), line 4 from the bottom, strike out the words "of the presence" and insert in lieu thereof the following: "that he was in the vicinity."

With these modifications the petition for rehearing is denied.

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2 Cal.App.2d 166

ARMSTRONG v. STUDER.

Civ. 1123.

District Court of Appeal, Fourth District, California.

Nov. 9, 1934.

Hearing Denied by Supreme Court Jan. 7, 1935.

1. Automobiles ⇨168(9)

Evidence supported finding of defendant's negligence in reference to speed of his automobile where his vision of highway immediately in front of him was obstructed and his inability to stop automobile after he should have seen plaintiff's automobile making left turn onto highway (St. 1931, p. 2120, § 113).

2. Automobiles ⇨245(67)

Contributory negligence of plaintiff motorist struck, while attempting to turn off private road onto main-traveled highway, by defendant's automobile coming over high bridge where view was obstructed, *held* for trial court, where plaintiff stopped and looked in both directions before proceeding upon highway, though his vision towards bridge was partially obstructed.

3. Automobiles ⇨245(67)

Where injured party fails to look for approaching automobile and takes no precautions for his safety, question of contributory negligence is usually for court, but, where he looks but does not see automobile, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself, question is usually for jury.

4. Appeal and error ⇨1011(1)

Reviewing court cannot reverse judgment because of conflicts in evidence nor because they might have rendered judgment in favor of losing party had they been sitting as trial judges.

◆

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action by W. H. Armstrong against John Studer. From a judgment for plaintiff, defendant appeals.

Affirmed.

Kendall B. Perkins, of El Centro, for appellant.

R. I. French, of El Centro, for respondent.

GRIFFIN, Justice pro tem.

This action was brought to recover damages suffered by respondent herein, growing out of injuries sustained by him when the automobile which he was operating collided with an automobile driven by appellant.

The accident occurred about 11:30 a. m. upon a public highway in Imperial county, at a place approximately 4 miles southeast of the city of El Centro.

The case was tried by the court without a jury and judgment rendered in favor of respondent. The judgment is based upon the finding of fact that appellant was guilty of negligence in the operation of his automobile. Appellant contends that this finding is contrary to, and is unsupported by, the evidence, and that the undisputed evidence demonstrates, as a matter of law, that respondent was guilty of contributory negligence barring a recovery.

There is little dispute as to the facts. The collision of the two automobiles occurred on a public highway known as "The McCabe Highway." This highway is a main-traveled thoroughfare, extending in a general easterly and westerly direction. It is sparsely settled in the vicinity of the scene of this accident; the highway being bordered on either side by farms and ranches. It is undisputed that the surface of the highway was in excellent condition, and likewise there was a large volume of vehicular traffic on this highway; it being the main-traveled highway extending into this farming district. An irrigation ditch, known as the "Eucalyptus Canal," intersects this highway at right angles. Where the highway crosses the ditch, a bridge 20 feet in width by 20 feet in length has been constructed to carry the traffic. The east and west approaches to the bridge are inclined; the bridge being 6 to 8 feet above the grade of the highway. Because of the inclined approaches, one traveling on the highway towards the bridge does not have a clear view of the highway on the opposite side of the bridge until one is within about 10 feet of the edge of the bridge nearest him. Both plaintiff and defendant were quite familiar with all the surrounding conditions and territory.

Some 40 to 45 feet east of the bridge, a private dirt road or lane parallels the irrigation ditch, the grade of which is about 4 feet lower than the grade of the highway which it abuts, and, upon entering the highway from this lane, it is necessary to ascend a sharp incline to attain the level of the highway. The view of the highway to the west is completely shut off by the west bank of the canal.

On the day of this accident, the court found specifically that plaintiff was proceeding down this lane with a mowing machine attached to the rear of his automobile, which was detached shortly before his arrival at the intersection, and that it was plaintiff's intention to enter the highway, proceed directly across the same to the north side thereof, and then to make a left turn west on the highway and proceed on his way.

Before reaching the highway, respondent states that he stopped, looked to the east and to the west down the highway for on-coming traffic, and, seeing none approaching, proceeded in low gear up the incline onto the highway; no warning being given by sounding the horn or otherwise. When the front wheels and hood of his automobile had reached a point on the highway a distance of about 2 feet from the south line of McCabe highway and while headed directly north, it was struck by defendant's automobile, which had at that moment come over the bridge from the west. The right end of the front bumper of defendant's car struck the left front wheel and fender of plaintiff's Ford, hurled it into a ditch to the south of the McCabe road some 30 feet from the point of impact, and, according to the evidence, defendant's car proceeded eastward beyond the point of impact 100 to 150 feet before coming to a stop, causing damage to plaintiff's car and person. Plaintiff and his witnesses variously estimated the speed of defendant's automobile as it came over the bridge at from 30 to 40 miles per hour. Plaintiff fixes his own speed at about 5 miles per hour as he drove onto the highway.

The facts of the case are practically undisputed, and due to the specific finding of the court, it requires only the application of the law to the facts found.

[1] Considering the question of negligence of the defendant, we find that there is sufficient evidence on which the court may make a finding of negligence on the part of the defendant in reference to the speed of his car under the conditions surrounding his approach and his crossing over the bridge when his vision of the highway immediately in front of him in effect was obstructed and his inability to stop his car after he should have seen that which must have been apparent to him. Section 113, California Vehicle Act (St. 1923, p. 553, as amended by St. 1931, p. 2120); Moore v. Bishop, 113 Cal. App. 25, 297 P. 580; White v. Davis, 103 Cal. App. 531, 284 P. 1086; Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125.

[2, 3] Considering the finding of the court that plaintiff was not guilty of contributory

negligence, we find a much closer question presents itself.

The evidence clearly shows that the plaintiff stopped and looked both in an easterly and westerly direction before proceeding upon the highway, and took every precaution necessary, had his vision to the west not been partially obstructed. We are quite familiar with the rule cited by appellant in White v. Davis, 103 Cal. App. 531, 542, 284 P. 1086, 1091, that:

"The question as to whether a given state of facts constitutes contributory negligence, as a matter of law, or whether it is a matter that should go to the jury, as a question of fact, is often a close one. The solution depends entirely upon the existing circumstances in each particular case. Unusual circumstances may determine in a given case whether or not reasonable minds might legitimately draw different conclusions on the question of negligence. There seems to be a general rule running through the cases where a pedestrian, or one standing on a highway, is injured by an automobile, which usually determines whether the question of contributory negligence is one of law, or of fact." Also cited with approval in Stephens v. Kaufmann, 137 Cal. App. 328, 30 P.(2d) 536. "Where the injured party fails to look at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, or, in other words, where he takes no precaution at all for his own safety, it is usually a question for the court. Where he looks but does not see an approaching automobile, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself, the question is usually one for the jury."

"When the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from those facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury, then, and only then, does the law step in and forbid plaintiff a recovery. * * * Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury." Moss v. H. R. Boynton Co., 44 Cal. App. 474, 186 P. 631, 632.

Appellant contends that, as the respondent's vision westerly down the road was limited to 45 feet, he was obliged to drive easterly on the highway to a place of safety and then make a complete turn. We see no merit in this contention.

From a study of the record, we find that the trial court might easily have found that both parties were negligent in the operation of their automobiles. If it had been held that each driver was guilty of negligence, there would have been ample evidence to support such a finding, and this court would certainly not have disturbed it. However, the trial court found that the respondent was free from any negligence, and that appellant was guilty of the negligent operation of his automobile, and solely responsible for the accident and ensuing damage.

[4] We cannot reverse a judgment because of conflicts in the evidence, nor because we might have rendered judgment in favor of the losing party, had we been sitting as trial judges. Therefore, having taken some precaution for his own safety and that of the defendant, the question of plaintiff's contributory negligence was one of fact to be decided by this trial court, and, that court having so held, we cannot disturb this conclusion on appeal.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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2 Cal.App.2d 70

Ex parte ROBERTS.

Cr. 2561.

District Court of Appeal, Second District, Division 2, California.
Nov. 7, 1934.

Witnesses 🔑21

Evidence established that witness who failed to appear in criminal case had no knowledge of order requiring her presence in court on day after that set in subpœna, and hence adjudging her in contempt for intentional failure to appear *held* error.

Proceeding in the matter of the application of Belle McCord Roberts for a writ of habeas corpus.

Commitment annulled, and petitioner discharged.

C. W. Humphreys, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and A. H. Van Cott, both of Los Angeles, for respondent.

PER CURIAM.

Petitioner was adjudged in contempt of court for failure to return to court as a witness for defendant in a criminal case on the trial date to which such case was continued. A jail sentence was imposed, and, in addition thereto, a fine was assessed with an alternative of further imprisonment in lieu of the fine. Commitment was issued and petitioner remanded to custody. The commitment sets out that subpœna directing petitioner to appear in court April 30, 1934, at 10 o'clock a. m., as witness in the case of People v. Frank J. Golden, was issued and served on her; that she was in court as a witness on April 30th; that all witnesses were ordered by the court, in open court, to remain in attendance except during such time as the court on April 30 and May 1, 1934, declared recesses over noon hours and evenings; that petitioner failed to attend court May 1, 1934; that she was brought in on a bench warrant; that a hearing on charge of contempt was held, at which petitioner testified; "and it appearing to said court that the failure of said Belle McCord Roberts to attend as a witness in this court on said May 1, 1934, was willful and intentional," she was adjudged in contempt of court and the punishment was imposed.

It appears from the transcript of the proceedings at the contempt hearing that the case was called for trial "somewhere around 9:30 to 10 o'clock Monday morning" (April 30), whereas the subpœna had directed petitioner to appear at 10 o'clock a. m. She stated that another case was being heard when she arrived in court on April 30th, that she asked the clerk about the Golden case, and the latter said it would not be tried until later, and that petitioner then left and went to Long Beach, where defendant was staying. There was no evidence that petitioner was present in court when the court instructed the witnesses to return on Tuesday. Petitioner testified that she was not in court when the case was called and that she did not know she had to be in court on Tuesday; that she was not familiar with court procedure and had been excused by the attorneys for defendant who had subpœnaed her.

There is no evidence that petitioner violated any instruction of the court which was communicated to her. It is true that general instructions were given for witnesses to remain in attendance, but this occurred at an hour earlier than that fixed by the subpœna, and petitioner was not present to hear them. The finding that petitioner's failure to appear as a witness on May 1st was willful and intentional is not supported by the record of the contempt proceedings. "One who has been adjudged guilty of contempt has but two remedies—habeas corpus and certiorari. * * * While neither writ is one of error, both extend to the entire record of the court below and to the evidence itself when necessary to determine jurisdiction. * * * When the only evidence in the record and the presumptions available to the petitioner are contrary to the findings and conclusions of the trial court, these must be disregarded." In re Lake, 65 Cal. App. 420, 224 P. 126, 127. Knowledge of the court's order on the part of the petitioner is essential to the jurisdiction of the court, and the record fails to show this fact.

The commitment is annulled, and petitioner discharged.

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2 Cal.App.2d 111

In re MAHN'S GUARDIANSHIP.

MAHN v. MAHN.

Civ. 9959.

District Court of Appeal, Second District, Division 1, California.

Nov. 8, 1934.

1. Guardian and ward 🔑10

Where father is dead, mother of minor child has natural right of preference to guardianship of child, but such right is not absolute, and where unfitness of mother is made to appear, guardianship may be awarded to another.

2. Guardian and ward 🔑13(3)

Evidence was unnecessary to sustain finding of fact in guardianship proceeding where finding was in accord with allegation contained in petition for appointment of guardian which allegation was not denied in answer to petition.

3. Appeal and error 🔑1170(7)

Alleged error in admission of evidence *held* not prejudicial where action of trial court did not result in miscarriage of justice (Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; Florence M. Bischoff, Justice pro tem.

In the matter of the guardianship of Gertrude Doris Mahn, a minor, wherein the petition of Mary T. Mahn for the guardianship of the minor was contested by Nellie Mahn. From an order or judgment by which the guardianship of the person and estate of the minor was awarded to petitioner, and from an order denying a motion for a new trial, contestant appeals.

Appeal from order denying motion for new trial dismissed, and judgment or order awarding guardianship affirmed.

Francis W. Bunnett, of South Gate, for appellant.

Ivan Miller, of Los Angeles, for respondent.

HOUSER, Justice.

The mother of Gertrude Doris Mahn, a minor, has appealed to this court from an order or judgment by which the guardianship of the person and the estate of said minor was awarded to the paternal grandmother of said minor.

In substance and effect, the principal ground urged by appellant as a reason for the reversal of the judgment is that the evidence was insufficient to sustain it.

[1] It is well-established law that in circumstances such as are here present (the father of the minor being dead), the mother of the minor has the natural right of preference; but that such right is not absolute. Where the unfitness of the mother is made to appear, the guardianship of the minor may be awarded to some other person. 13 Cal. Jur. 153; see, also, authorities cited under section 13 of title Guardian and Ward, in the 1928 and 1932 Supplements to Cal. Jur. An examination of the record herein shows that the evidence upon which the trial court had authority to rest its conclusion was ample to sustain the judgment. Nor may it properly be concluded that the trial court abused its discretion in the matter.

[2] Appellant also complains that no evidence was introduced in support of a certain finding of fact made by the trial court; but in view of the situation that the finding was in accord with the allegation that was contained in the petition for the appointment of the guardian, which allegation was not denied in the answer to such petition, in order to sustain a finding of fact in that behalf, no evidence was necessary. The failure on the part of the respondent to the petition to deny the fact alleged in the petition, in itself was an admission of the fact.

[3] Finally, appellant urges the point that, over the objection of appellant, the trial court committed prejudicial error in the admission of certain evidence. But even conceding the correctness of appellant's assertion regarding the commission of the alleged error in that regard, this court is convinced that the action of the trial court did not result in a miscarriage of justice. Section 4½, art. 6, Const.

The judgment or order is affirmed. Since no appeal lies from an order denying a motion for a new trial, appellant's appeal in that regard is dismissed.

We concur: CONREY, P. J.; YORK, J.

2 Cal.App.2d 193

BRAND v. DRINKHOUSE et al.

Civ. 8724.

District Court of Appeal, First District,
Division 2, California.
Nov. 13, 1934.

Vendor and purchaser 🔑350

Purchaser accepting deed during trial *held* not entitled to damages against vendors for withholding conveyance because of offers made to purchaser to buy property, in absence of evidence of vendors' bad faith and that any offeror was ready, able, or willing to purchase property and of value of property offered in exchange (Civ. Code, § 3306).

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by A. W. Brand against F. R. Drinkhouse and others. From a judgment for plaintiff, defendants appeal.

Judgment modified, and, as so modified, affirmed.

W. P. Caubu and Robert L. Levy, both of San Francisco, for appellants.

Clark & Callaghan and Richard M. Callaghan, all of Livermore, for respondent.

STURTEVANT, Justice.

From a judgment in favor of the plaintiff in an action to obtain a decree of specific performance the defendants have appealed.

Heretofore the defendants purchased a lot in Livermore at a delinquent tax sale. Thereafter on January 14, 1928, they entered into a contract with the plaintiff by the terms of which they agreed to convey to him "* * * the title to said property, free and clear of encumbrances, as per title of record of said vendors recorded July 31, 1926, Liber 1397, Page 97 Official Records, at Alameda County, State of California." The consideration was $167.50, payable $25 down and $15 on the 15th day of each month thereafter, together with 7 per cent. interest. By the terms of the contract the plaintiff was let into the immediate possession of the property. He made all payments as provided in the contract except the interest. Later he computed the interest $4.35, and tendered it to the defendants, and at the same time demanded a deed. No deed was made, and on July 22, 1929, he commenced this action. Before the defendant Drinkhouse was served with the summons, he executed a deed and caused it to be recorded. Thereafter he filed an answer in which he denied many of the allegations of the plaintiff's complaint and also pleaded the fact that he had executed the deed. The defendant Green filed an answer in which he denied many of the material allegations of the complaint, but during the course of the trial he tendered a deed in due form executed by both himself and his wife. The record is not clear, but as we understand it the plaintiff accepted the deed. In the original complaint of the plaintiff there was no allegation of damage, but in the prayer the plaintiff asked a decree including, among other things, $500 as damages. On the trial the plaintiff, over the objection and exception of the defendants, gave evidence to the effect that after the contract was made the plaintiff received certain offers to purchase the property. One of those offers was made by Mr. Ketchum, who testified that he offered to exchange his garage for the property. No witness testified as to the value of the garage nor the value of the property described in the contract. No testimony on the subject of good or bad faith on the part of the defendants was introduced. No evidence was given by any witness that any one making an offer to the plaintiff was ready, able, or willing to purchase plaintiff's property. After the trial was over, and before it was submitted, the plaintiff filed an amended complaint in which he recited: "That plaintiff has had offers from several persons to purchase said property, and that by reason of defendants' failure to execute a conveyance to plaintiff of said property plaintiff has lost the sales of said property to his damage in the sum of $500." In making its findings the trial court found that the plaintiff was damaged in the sum of $300. The defendants at this time assert that said finding is not supported by the evidence. The point must be sustained. Freely conceding that under some circumstances damages may be awarded in an action for specific performance, the manner of estimating such damages is limited by the terms of the statute. Civ. Code, § 3306. That section provides: "The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land." From what we have said it clearly appears that the plaintiff proved no damage and that the decree should be modified. Coger v. Wiltsey, 117 Cal. App. 652, 4 P.(2d) 302, is directly in point.

From the last paragraph of the judgment the words "* * * the sum of $300 as and for damages for withholding said conveyance, and also * * *" are stricken out. As so modified the judgment is affirmed. The defendants will recover their costs on this appeal.

We concur: NOURSE, P. J.; SPENCE, J.

2 Cal.App.2d 196

SMITH v. KLOPSTOCK et al.

Civ. 9214.

District Court of Appeal, First District, Division 2, California.

Nov. 13, 1934.

Sales 🔑**52(6)**

In action on book account for goods sold and delivered, that plaintiff and his assignor might have been confused as to whether claim could be asserted against person other than one to whom goods were delivered *held* not to defeat liability, where uncontradicted testimony showed that defendant ordered goods, directed that they be delivered to another, and agreed to pay for goods.

◆

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by J. L. Smith against I. D. Klopstock and another. From a judgment for plaintiff, Grace E. Klopstock, executrix, and Frederick Klopstock, executor, of the estate of I. D. Klopstock, deceased, substituted in place and stead of I. D. Klopstock, appeal.

Affirmed.

Gus C. Ringole, of San Francisco, for appellants.

Jerome L. Schiller and J. L. Smith, both of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff, as assignee of Thomas Hewitt, brought this action to recover the sum of $350 upon a book account for goods sold and delivered. The case was tried by the court sitting without a jury, and plaintiff had judgment as prayed against defendant I. D. Klopstock. Said defendant appealed from said judgment, and after his death the above-named appellants were substituted herein in his place and stead.

Appellants make the contention that the evidence was insufficient to prove a book account or to prove the delivery of the goods. In our opinion, a review of the record shows that there was ample evidence to prove both. Appellants further contend that there were such inconsistencies in the testimony of plaintiff and his assignor "as to make plaintiff's case inherently improbable." We find no merit in this contention. Appellants deal mainly with the testimony concerning the assignment of the claim against both defendants named in the action. The uncontradicted testimony showed that defendant I. D. Klopstock ordered the furniture, directed that it be sent to the defendant R. Penberthy, and agreed to pay for the same. The fact that there may have been some confusion in the minds of plaintiff and his assignor as to whether a claim could be asserted against the defendant Penberthy as well as defendant I. D. Klopstock is immaterial on this appeal.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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1 Cal.App.2d 729

PEOPLE v. SINGH et al.

Cr. 262.

District Court of Appeal, Fourth District, California.

Nov. 2, 1934.

1. Criminal law 🔑**1024(1)**

Attorney General's request for appellate court's decision on ruling of trial court on question in conspiracy prosecution *held* proper, although it appeared that questioned ruling was actually in state's favor (Pen. Code, § 1252).

2. Criminal law 🔑**393(1)**

Generally, self-incriminating testimony of defendant given before grand jury, without instructions as to his right to refuse to give such testimony, cannot be used against him in his trial.

3. Criminal law 🔑**423(1)**

Rule allowing statements or declarations of one conspirator to be given in evidence against coconspirator requires not only that conspiracy be pending and its object not consummated when declarations are made, but also that such declarations must be in furtherance of common purpose of conspiracy.

4. Criminal law 🔑**1120(4), 1134(3)**

Ruling excluding testimony in conspiracy prosecution *held* not reviewable where testimony was not in record, and where question was moot as regarded declaration against interest in that defendant had been acquitted on trial (Pen. Code, § 1252).

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

J. Labh Singh and others and W. J. Robbins and others were prosecuted for conspiracy, J. Labh Singh and others were convicted, and they appeal.

Reversed and new trial ordered.

Harry W. Horton, of El Centro, and De Forrest Home, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and Elmer W. Heald, Dist. Atty., and D. H. Wolford, Deputy Dist. Atty., both of El Centro, for the People.

MARKS, Justice.

Appellants, together with the defendants who have not appealed, were charged in two separate indictments with conspiring to violate the Alien Land Law (St. 1921, p. lxxxiii, as amended). The cases were tried together, the appellants convicted and judgments pronounced upon them. They are here on appeal from the judgments and from the orders denying their motions for new trial.

The cases were tried before the decision of Morrison v. People of the State of California, 291 U. S. 82, 54 S. Ct. 281, 78 L. Ed. 664. The Attorney General concedes that under authority of that case the judgments and orders denying motions for new trial must be reversed.

Under authority of section 1252 of the Penal Code, the Attorney General has requested us to pass upon two questions that become important in the event of a second trial. These questions are: (1) Was the contract between the California-Nevada Farming Company and J. Labh Singh a contract of employment at a fixed wage, or a cropping contract? (2) Did the trial court err in refusing to permit the testimony of a defendant given before the grand jury to be introduced in evidence at the trial?

[1] Appellants object to our answering the first question. They assert that as section 1252 of the Penal Code provides that the Attorney General may ask the appellate court to "pass upon all rulings of the trial court adverse to the state," and that since the ruling of the trial court in holding the contract in question a cropping contract was in favor of the state, we are not required to answer the question. The soundness of this argument must be admitted. However, we have examined the contract, and the cases cited, and have no hesitation in saying that we do not question the correctness of this ruling of the trial judge.

[2, 3] The correct general rule governing the admissibility, as primary evidence of testimony of a defendant given before a grand jury is stated in People v. O'Bryan, 165 Cal. 55, at page 62, 130 P. 1042, 1045, as follows: "Here the defendant when brought before the grand jury was in custody under an accusation of guilt of the crime under investigation. Taken into the presence of that body by the sheriff, sworn and examined without the aid of counsel, and without any instruction as to his rights, it cannot be said that his submission to the interrogation was in any fair sense voluntary. The great preponderance of authority is that testimony so given by a defendant is not to be used against him. United States v. Kimball (C. C.) 117 F. 156, 163; Boone v. People, 148 Ill. 440, 36 N. E. 99; State v. Clifford, 86 Iowa, 550, 53 N. W. 299, 41 Am. St. Rep. 518; State v. Froiseth, 16 Minn. 296 (Gil. 260). Of the cases cited to support the admission of this testimony, the only one which need be noticed is People v. Sexton, 132 Cal. 37, 64 P. 107, in which this court used the following language: 'Defendant's statements, whether made in the grand jury room, at the trial, or extrajudicially, may be used against him, and we see no error in their admission here.' The report of the decision does not disclose the conditions under which the defendant in the Sexton Case testified before the grand jury. It may well be assumed that no accusation had been made against Sexton, or that he gave his testimony voluntarily, with full knowledge of his right to remain silent. In either of these events his declarations were properly admitted in evidence at the trial." This general rule is subject to the following modifications in conspiracy cases: "The rule allowing statements or declarations of one conspirator to be given in evidence as against his co-conspirator requires, not only that the conspiracy be pending and its object not consummated when the statements or declarations are made, but also that such statements, in order to be admissible, must be in aid and furtherance of the common purpose or design of the conspiracy. The rule is stated in Cyc., vol. 8, p. 680: 'Acts or declarations of a conspirator cannot be admitted as against a co-conspirator, unless such acts were performed or declarations made in aid or execution of the conspiracy.' And, as to the admission of such statements or declarations, it is said in People v. Irwin, 77 Cal. 494, 504, 20 P. 56, 59: 'No declarations except those made "during the pendency of the conspiracy and in furtherance of its objects," can be used against a co-conspirator. Declarations show-

ing past acts, or expressing merely the opinion or desire of the conspirator making them, are not binding upon any one except himself, or those in whose presence they are made.'" People v. Smith, 151 Cal. 619, at pages 625, 626, 91 P. 511, 513.

[4] The testimony in question, which the trial court excluded, was that of defendant W. J. Robbins who was acquitted by the jury. The question is moot as far as the introduction of this testimony as a declaration against interest by Robbins is concerned as he cannot be retried. The testimony sought to be introduced is not in the record. The proffer made by the district attorney is so meager that we cannot determine that the questioned ruling in excluding the evidence against the coconspirators was error even if we indulge in the questionable assumption that Robbins was a conspirator after he was found not guilty of the conspiracy. For these reasons, the second question cannot be answered on the record before us.

The judgments against appellants, and orders denying motions for new trials are reversed and new trials are ordered.

We concur: **BARNARD**, P. J.; **JENNINGS**, J.

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1 Cal.App.2d 694

GOODYEAR TIRE & RUBBER CO. OF CALIFORNIA v. WELLS FARGO BANK & UNION TRUST CO. and four other cases.

Civ. 8032.

District Court of Appeal, Second District, Division 1, California.

Oct. 31, 1934.

Hearing Denied by Supreme Court Dec. 27, 1934.

1. Bills and notes 🔑6

Check drawn to payee who may be actual existing person but who is not intended to have any interest therein is "bearer" paper, as respects forgery thereof (Civ. Code, § 3090, subd. 3).

[Ed. Note.—For other definitions of "Bearer," see Words & Phrases.]

2. Bills and notes 🔑6

Under statute providing that check payable to fictitious or nonexisting person is payable to bearer if person making check so payable knows such fact, "fictitious person" can be any one named in check irrespective of actual, fictitious, or nonexisting character of payee, if it be intended by person making check payable to payee that such payee should have no interest in check (Civ. Code, § 3090, subd. 3).

[Ed. Note.—For other definitions of "Fictitious Person," see Words & Phrases.]

3. Bills and notes 🔑6

Under statute providing that check payable to fictitious or nonexisting person is payable to bearer if "person making check so payable" knows such fact, drawer or maker of check and "person making check so payable" can be different persons, and it is knowledge of "person making check so payable" as distinguished from maker or drawer of check which is controlling in determining if check is payable to bearer (Civ. Code, § 3090, subd. 3).

[Ed. Note.—For other definitions of "Person Making it so Payable," see Words & Phrases.]

4. Bills and notes 🔑6

Corporate maker or drawer of check is bound by intention of employee who must, along with other employees, do something in making of check essential to its validity when thing done is within scope of authority of employee, and when employee acting within scope of his authority actively creates check or puts it into circulation, as regards liability of bank for payment of check drawn by employee to fictitious payee (Civ. Code, § 3090, subd. 3).

5. Bills and notes 🔑6

Where check was drawn to fictitious payee by employee authorized to draw checks, knowledge of employee as to fictitious character of payee was binding on corporate maker so as to make check "bearer check," for payment of which bank was not liable irrespective of whether corporate maker was negligent, notwithstanding that another employee without knowledge of fictitious character of payee cosigned checks, where employee drawing checks also circulated checks (Civ. Code, § 3090, subd. 3).

6. Bills and notes 🔑381

When negotiable paper, regular on its face, is delivered or circulated by maker with indorsement thereon, such indorsement will be deemed valid in hands of bona fide holder.

◆

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Actions by the Goodyear Tire & Rubber Company of California against the Wells Fargo Bank & Union Trust Company in which defendant filed a cross-complaint; against the Security Trust Savings Bank; and against the Security-First National Bank of Los Angeles in which the defendant filed a cross-complaint; and actions by the Goodyear Tire & Rubber Company of California, Inc., against the Wells Fargo Bank & Union Trust Company, in which the defendant filed a cross-complaint and the Los Angeles First National Trust & Savings Bank was a cross-defendant; and against the Security-Trust & Savings Bank, which were by stipulation consolidated for the purpose of trial. From the judgments, all the defendants appeal.

Judgments for the plaintiff and the judgment for the cross-complainant, Wells Fargo Bank & Union Trust Company against the cross-defendant, Los Angeles First National Trust & Savings Bank reversed.

Hearing denied by Supreme Court; PRESTON, J., dissenting.

John M. Hall, Flint & MacKay, William A. Bowen, Edward L. Compton, Jennings & Belcher, and Frank B. Belcher, all of Los Angeles, for appellants.

O'Melveny, Tuller & Myers, Homer I. Mitchell, Charles X. Arnold, and John L. Rush, all of Los Angeles, for respondents.

ROTH, Justice pro tem.

These appeals are, by stipulation, brought before us on a single bill of exceptions. They embrace five separate actions which were in the court below, by stipulation, consolidated for the purpose of trial.

Although there are two several plaintiffs and four several defendants, the facts and the issues raised, with certain exceptions hereinafter specifically noted, are such that the cases may be treated as if there were but one action. The several and collective actions will therefore, except when otherwise necessary, be referred to in the singular, such designation, for the purposes of this decision, including all five actions.

Respondent sued appellant for an alleged balance due on its bank account. Appellant answered there was no balance due.

The controversy arises out of the following facts, most of which were included in a stipulation of the parties and such as were not included appearing without conflict in the evidence:

In 1919 respondent transferred one Downs, who was then and who had been theretofore for some time employed by it in Akron, Ohio, to California. From 1919 to 1926, he was manager of the accounting department and also held the offices of cashier, treasurer, and comptroller. In the conduct of its business, respondent frequently became obligated to its customers, of which it had approximately 20,000 on its books, for credit balances in favor of the latter which might arise from goods returned, claims for replacements, discounts, and in other ways. Upon determination of a credit balance respondent would draw a check to the customer and thus discharge the same. All records involving these credit balances were kept directly under Downs' supervision and control and it was also a part of his duties to attend to the payment and discharge of the same. Under arrangement existing between respondent and appellant during this entire period of time, two signatures were required on all checks drawn by respondent. One of the signatures authorized was that of Downs.

Abusing the confidence of his employer, Downs, over a period of years, specifically from 1921 to 1926, created on the books of respondent fictitious accounts and by various means caused fictitious credit balances to be set up on the books to these fictitious accounts. Thereafter, Downs prepared or caused to be prepared checks to discharge these fictitious obligations. All checks so drawn, of which there are 70 here involved (with the exception of 1), were signed by Downs and some other cosigner. The one exception will be separately treated.

Pursuant to the system employed by respondent, Downs or a clerk working under his supervision would make the routine memoranda, requisitions, ledger cards, sales ledger and journal slips, and do any other things required by the bookkeeping routine as conditions precedent to the drawing of a check. The check would then be typed and presented with the necessary supporting documents, all of which when prepared appeared to be regular on their face, to the cosigners of Downs. The cosigners, in reliance upon the system used by respondent and being satisfied that the supporting documents were in order, would sign the checks. When the checks were presented to Downs' cosigners, supporting documents were not always presented. In some instances Downs had already signed and the cosigners added their signatures on the strength of the signature of Downs. While it appears that with reference to many of the checks involved Downs was the last man who signed the check, it is not clear how many checks were last signed by Downs. When the checks were completed, Downs stole the same, indorsed the names of the fictitious payees, and obtained the cash. The checks involved totaled in excess of $100,-

000, are regular on their face, and it is admitted that they were all signed by persons thereunto duly authorized to make signature. Most of the checks were cashed by Downs through one Pete Merich, who deposited the same for collection with one of three banks, and thereafter, through the clearing house, these checks were presented to and paid by appellant. Appellant made payment upon the faith of the guarantee of the prior indorser, making no investigation to determine whether the signature of the original payee was genuine. In some instances Downs indorsed several of the checks below the indorsement of the nonexisting payee, presenting such checks personally to appellant and receiving the cash.

During this entire period, pursuant to arrangement made at the time respondent opened its account, appellant rendered monthly statements and, as a part thereof, returned all canceled checks to respondent. Each statement so rendered contained a notice substantially to the effect that, unless an error was reported within ten days, the account and the vouchers would be deemed correct. It was stipulated in this case that respondent made no complaint and pointed out no error until some time in March, 1926. The evidence also discloses that respondent had an annual audit made by a firm of certified public accountants and that during this period of time it issued regularly between 3,000 and 5,000 checks per month or between 180,000 and 300,000 during the period of time involved. In making the annual audit, the accounting firm picked out test transactions at random and tested such random selections from beginning to end. In February, 1926, in the process of one of these annual audits, the perfidy of Downs was discovered. A complete report by the auditors followed on March 15, 1926, whereupon demand was made upon appellant for the amount involved.

Respondent asserts that all of said checks were paid on forged indorsements and that the appellant, therefore, wrongfully charged these checks to its account and owes to it a balance in the amount of the total of said checks. The trial court agreed with this contention, rendered judgment accordingly, and from that judgment appellant brings this appeal. Respondent's case is predicated entirely upon the duty of appellant bank with reference to the payment of checks as stated in Los Angeles Investment Co. v. Home Savings Bank, 180 Cal. 601, at page 604, 182 P. 293, 294, 5 A. L. R. 1193, as follows:

"The general rule must be conceded that the undertaking of a bank is to pay out the depositor's money only on the order of the depositor and in accordance with that order. If it pays out money on a check drawn to order, as were the checks in this case, upon a forged indorsement of the payee's name, it has not paid in accordance with the depositor's order, and, in the absence of anything further, has no right to charge such payment against the depositor's account." Hatton v. Holmes, 97 Cal. 208, 31 P. 1131; Union Tool Co. v. Farmers', etc., Bank, 192 Cal. 40, 218 P. 424, 28 A. L. R. 1417; Jordan Marsh Co. v. National Shawmut Bank, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250; Shipman v. Bank, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; Leather Manufacturers Nat. Bank v. Merchants Nat. Bank, 128 U. S. 26, 34, 9 S. Ct. 3, 32 L. Ed. 342. Appellant's principal contention, and the one which is decisive of the case at bar is that the checks having been drawn to nonexisting persons were payable to bearer within the meaning of subdivision 3 of section 3090 of the Civil Code, and that no indorsement was necessary. Appellant asserts that as no indorsement was necessary, there could be no forgery. If this be true, appellant cannot be held liable.

[1, 2] It becomes important, therefore, to determine when a check is a "bearer" check. The applicable statutory provision is subdivision 3 of section 3090 of the Civil Code, which reads as follows: "§ 3090. *Payable to Bearer.* The instrument is payable to bearer— * * * (3) When it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable."

The case of Seaboard National Bank v. Bank of America, 193 N. Y. 26, 85 N. E. 829, 831, 22 L. R. A. (N. S.) 499, recognized as a leading case on this subject, lays down the rule that the intention to make the instrument payable to a fictitious person "must * * * exist as an affirmative fact in the mind of the drawer of a draft at the time of its delivery." In the construction of this particular language it has been recognized that "fictitious or nonexisting persons" literally construed is not sufficiently embracive to cover all situations in which the instrument is "bearer" paper within the meaning of said language. Thus it has been definitely established and the rule has been consistently followed that a check drawn to a payee, who may be an actual existing person but who is not intended to have any interest therein, is "bearer" paper. The classical construction of this language is made in Bank of England v. Vagliano, [1891] L. R. App. Cas. 107, "* * * where, the payee named is so named by way of pretense only without the intention that he shall be the person to receive payment, is it doing violence to the language to say that the payee is a fictitious person? I think not. I do not think that the word 'fictitious' is exclusively used to qualify that which has no real existence." The phrase "fictitious or nonexisting person" is subject to other ambiguities, some of which are not covered by the literal language and which obviously must be embraced therein, and others of which are covered by the literal language and which obviously must be excluded ("The Fictitious Payee," 18 Mich. L. R. 296), but these other ambiguities are not important here. For our purpose, it is sufficient to adopt the language of the court in Norton et al. v. City Bank & Trust Company (C. C. A.) 294 F. 839, 844, wherein it is said: "Nevertheless, the law is now well settled that a negotiable instrument is drawn to a fictitious payee whenever the payee named in it has no right to it, and its maker does not intend that such payee shall take anything by it." And the court in the case of Snyder v. Corn Exchange National Bank, 221 Pa. 599, 606, 70 A. 876, 878, 128 Am. St. Rep. 780, says: "The intent of the drawer of the check in inserting the name of a payee is the sole test of whether the payee is a fictitious person. * * * It is clear, then, that, when the Legislature declared that a check payable to a 'fictitious or nonexisting person' is to be regarded as payable to bearer, it meant a fictitious person to be one who, though named as payee in a check, has no right to it, or the proceeds of it, because the drawer of it so intended, and it therefore matters not whether the name of the payee used by him be that of one living or dead, or of one who never existed." Phillips v. Mercantile National Bank, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596; Bartlett v. First Nat. Bank, 247 Ill. 490, 93 N. E. 337; Coggill v. American Exchange Bank, 1 N. Y. 113, 49 Am. Dec. 310. It is clear from the foregoing that a fictitious person can be any one named in a check irrespective of the actual fictitious or nonexisting character of such payee if it be intended by the "person making it so payable" to the payee that such payee should have no interest in the check.

[3] The next question which must be determined is what is meant by the language in the statute, "* * * such fact was known to the person making it [the check] so payable." This question has also been decided by the cases. The authorities establish the proposition that the "drawer" or "maker" of a check and "the person making it so payable" can be and frequently are different and that it is the knowledge of "the person making it so payable," as distinguished from the "maker" or "drawer" of the check, which is controlling. Rancho San Carlos, Inc., v. Bank of Italy, 123 Cal. App. 291, 11 P.(2d) 424. In the San Carlos Case the court, at page 295 of 123 Cal. App., 11 P.(2d) 424, 426, said: "It has been held that the words, 'the person making it so payable,' refer to the person who actually drew the check, whether he be the nominal maker or not. Mueller et al. v. Liberty Ins. Bank [187 Ky. 44, 218 S. W. 465], supra; American Sash, etc., Co. v. Commerce Trust Co. (Mo. App.) 25 S.W.(2d) 545."

In the case of Mueller et al. v. Liberty Ins. Bank, 187 Ky. 44, at page 48, 218 S. W. 465, 467, the court said: "Appellant would have us construe this clause, 'and such fact is known to the person making it so payable,' as applicable to the maker of the bill rather than 'the person making it so payable'; that is, that Mueller & Martin must be chargeable with notice that the checks were made payable to a fictitious person before the checks can be considered as payable to bearer. If this were its meaning, then the whole provision would be ineffective in practically every case where the purpose of the person drawing the check was fraudulent. * * * Such, however, is not its meaning as is plain from the very language employed as well as the evident intent of the enacting power. The words 'the person making it so payable,' given their ordinary meaning, refer to the person who actually drew the bill, whether he be the nominal maker or not. Had the Legislature intended that this should refer not to the person drawing the check but to the nominal maker, more fitting language certainly would have been employed, as might easily have been done." See, also, Bartlett v. First National Bank, 247 Ill. 490, 93 N. E. 337; Phillips v. Mercantile National Bank, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596; Snyder v. Corn Exchange Nat. Bank, 221 Pa. 599, 70 A. 876, 128 Am. St. Rep. 780.

It will be noted that in the San Carlos Case, supra, "the person making it [the check] so payable" was not even a signer. The nominal maker signed a blank check and delivered it to an employee, thereby clothing the employee with power to designate the payee and fix the amount. The nominal maker did not know that the check was drawn to a fictitious payee. The trusted employee did. The court held the employee to be "the person making it [the check] so payable," saying at page 295 of 123 Cal. App., 11 P.(2d) 424, 426: "* * * And in principle the same rule should apply where the person who actually makes the check payable is expressly or impliedly authorized to complete it in that manner."

Other cases in which the name of the payee was left blank and afterwards inserted, in which it was held that the checks became "bearer" paper upon the insertion of a fictitious payee, are: Cassetta v. Baima, 106 Cal. App. 196, 288 P. 830; Rich v. Starbuck, 51 Ind. 87 (1875); Johnston Harvester Co. v. McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39 (1883); Chemung Canal Bank v. Bradner, 44 N. Y. 680 (1871); Wilson v. Kinsey, 49 Ind. 35 (1874); Edelen v. Oakland Bank of Savings, 39 Cal. App. 302, 178 P. 737. The Edelen Case was not decided on the above principle, but it quite definitely could have been, although the result reached would have been the same.

The case of Los Angeles Inv. Co. v. Home Sav. Bank, 180 Cal. 601, 182 P. 293, 295, 5 A. L. R. 1193, is as to the facts practically identical to the case at bar *except* that one Emory, the perfidious employee in the case, *did not have the authority to execute checks.* The question arose in that case as to whether or not the checks made to nonexisting persons were made to fictitious payees. The court said:

"It is also true that the payee named in several of the checks had no existence in the mind of Emory, and that the payees named in all of the others with one exception—that prepared on a bona fide demand—were persons to whom Emory did not intend the checks to come. As to Emory, the payees, with the single exception noted, were all fictitious. The question is: Were they fictitious as to the plaintiff company?

"The answer to this question obviously depends upon whether Emory's intention that the checks be made payable to persons who were not to receive the paper, who were nonexistent so far as the checks were concerned, is attributable to the company. The bank's counsel in their brief say: 'But appellant did intend something when it issued the checks. What was it? It intended that the money be paid to the person to whom Emory intended it to be paid—and the money was so paid.'

"This is the very crux of the matter. But is it true? Plainly it is not. Emory did not execute the checks on behalf of the company. It is the intention of the officers who did that must be taken to be the intention of the company. The execution of the checks was one within the scope of their authority, not within that of Emory. As to these officers, it is plain that they did not intend to execute checks to fictitious parties or to pay money to the person to whom Emory intended it should be paid, to wit, himself. They intended to pay money to what they believed to be existent persons, and, this being so, the checks cannot be considered as made to fictitious payees."

The above excerpts from the Home Savings Bank Case are approved in a number of cases where the check is made to a fictitious or nonexisting person and was so intended by the person who actually signed the check on behalf of the maker, such signer having authority to sign. Checks so made are held to be "bearer" checks. In the case of Phillips v. Mercantile National Bank, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596, one Bartlett, cashier of the Bank of Sumter, of South Carolina, drew twelve checks which were paid by the defendant bank and thereafter debited to the Bank of Sumter. Bartlett drew these checks in the names of payees who actually resided in Sumter and who were customers of the bank. They knew nothing of the checks which were not drawn against their funds, and had no connection whatever in the transactions of Bartlett in issuing the checks. Bartlett, after having drawn the checks, indorsed them in the name of the payee making them payable to the order of a firm of stock brokers in New York, who collected them from the defendant bank. By manipulation of the books, Bartlett was able to prevent a discovery of this fraud until after he had absconded and the insolvency of his bank was disclosed. The court said: "* * * That the intention was to treat them (the payees named who were existing persons but had no interest in the checks) as being of fictitious persons is manifest. As cashier, invested with the authority to draw checks upon the bank's accounts, * * * he drew them to the order of persons who had no interest in them, and thereupon wrote their names under a direction to pay to the real parties, who were intended to be the recipients of the funds drawn upon. If the checks had been drawn directly to the order of the real parties, the defendant would undoubtedly have been protected in paying them. As it was, the payees were fictitious persons in the eye of the law. * * * The fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existent person, but upon the intention underlying the act of the maker in inserting the name. * * *" Page 562 of 140 N. Y., 35 N. E. 982, 983.

The court then draws the distinction between the type of case in which a perfidious employee has authority to draw checks and one in which he has no such authority: "The distinction between such a case and the many other cases which the plaintiff's counsel cites from is in the fact that it was within the scope of this cashier's powers to bind the bank by his checks."

The same distinction is accurately drawn in the Home Savings Bank Case, supra, where the court says (at page 606 of 180 Cal., 182 P. 293, 295): "Nor is the company bound by the guilty knowledge of Emory. That knowledge was adverse to his company and such as in the nature of things he would not communicate to it. It is elementary that a principal will not be charged with knowledge of an agent under such circumstances. Henry v. Allen, 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658; United, etc., Co. v. Central, etc., Bank, 185 Pa. 586, 40 A. 97. *This, of course, is very different from an agent binding his principal by acts done within the scope of his authority,* although done with knowledge and intent adverse to his principal; and we have no intention of saying that an agent may not bind his principal under such circumstances. It may well be that in this case, if Emory had had authority to draw checks, and had drawn these particular ones making them payable to fictitious payees, his intent in this respect would, in legal effect, as to third persons be the intent of the company, although such intent was adverse to the company and part of a scheme to defraud it. But charging a principal with knowledge merely because such knowledge is possessed by an agent, and charging him with acts done by the agent within the scope of his authority, are not the same thing, and it is only in the latter case that the principal may be bound by the uncommunicated information or intent of the agent when such information or intent is hostile to the principal. *The point in this case is that the checks were not executed by the guilty agent;* we are not concerned with an act done by him within the scope of his authority, and therefore his guilty intent and knowledge are not the intent and knowledge of his principal. The intent and knowledge of the principal was, as we have said, that of the officers who drew the checks, and they were wholly innocent of any intention of drawing checks to fictitious payees." (Italics ours.)

[4, 5] It will readily be understood, therefore, that if in the instant case the employee, Downs, had no authority to sign checks, the questions here presented could be answered completely by the Home Savings Bank Case, supra, and the judgment of the trial court would be correct. U. S. Cold Storage Co. v. Central, etc., Bank, 343 Ill. 503, 175 N. E. 825, 74 A. L. R. 811; Shipman v. Bank, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 L. R. A. 791, 22 Am. St. Rep. 821; American Sash & Door Co. v. Commerce Trust Co., 332 Mo. 98, 56 S.W.(2d) 1034. It will also be readily understood that if in the case at bar Downs alone were authorized to sign checks without the necessity of any cosigner, that the case would be just as easy of solution and the judgment of the trial court would be incorrect. Bartlett v. First Nat. Bank, 247 Ill. 490, 93 N. E. 337; Phillips v. Mercantile Nat. Bank, supra; Snyder v. Corn Exchange Nat. Bank, 221 Pa. 599, 70 A. 876, 128 Am. St. Rep. 780; Mueller et al. v. Liberty Ins. Bank, supra; Rancho San Carlos v. Bank of Italy, supra; Edelen v. Oakland Bank, 39 Cal. App. 302, 178 P. 737; Otis Elevator Co. v. First National Bank, 163 Cal. 31, 124 P. 704, 41 L. R. A. (N. S.) 529. The specific question which is presented then is whether the intention of Downs, who was authorized to draw checks, to have said checks drawn in favor of fictitious payees is binding upon the maker of the checks, to wit, the corporate principal, irrespective of the fact that it was necessary for said checks so drawn by Downs to be cosigned by some other employee or officer of respondent. This question has never been decided.

In our opinion, the principles enunciated in the Home Case and in the other cases cited, particularly that of Rancho San Carlos v. Bank of Italy, 123 Cal. App. 291, 11 P.(2d) 424, warrant and impel an extension of the doctrine laid down by the Home Case and indorsed by the other cases that "the intent and knowledge of the principal was, as we have said, that of the officers who drew the checks" (Home Savings Bank Case, supra, page 607 of 180 Cal., 182 P. 293, 295), so that a maker or drawer of a check is bound in every instance where multiple signatures are required, by the intention of a single person with reference to such check when it is necessary for such single person to do something in the making of the check essential to its validity which is done within the scope of the authority of such single person and when such single person is the person, who within the scope of his authority actively creates the check or puts it into circulation. Any check so made or circulated would and should be a "bearer" check within the scope of subdivision 3, section 3090 of the Civil Code as said section has been construed by the cases, and as, indeed, common sense dictates its construction. An analysis of the San Carlos Case, and the Otis Elevator Case, supra, demonstrates that the original principle has been in fact already so extended.

An analysis of the cases based in all respects upon similar facts as the case at bar (with the exception of the dual character of the signatures here involved) in which frauds have been perpetrated by employees and in which the banks have been held responsible shows clearly that the line of demarcation in every one of them has been that the employees involved had no authority to make checks. Such cases hold that since such employee could not within the scope of his authority utter a check, that his intention could not bind his employer. In those cases in which the banks have been held blameless, the employee or officer did have authority to utter checks, but in all such cases only one signature was required, which was the signature of the faithless employee.

Our attention has been called to two anomalous cases in which the bank has been held blameless where dual signatures were required. P. & G. Card & Paper Co. v. Fifth National Bank (Sup.) 172 N. Y. S. 688; Hackensack Trust Co. v. Hudson Trust Co., 119 Misc. 689, 197 N. Y. S. 158. The Hackensack Case differed from the instant one in one important fact which might have some significance. This case will be referred to hereafter. The case upon the authority of which the P. & G. Card & Paper Co. Case was decided, to wit, Hartford v. Greenwich Bank, 157 App. Div. 448, 142 N. Y. S. 387, has been overruled by the New York Court of Appeals in Bernhard Ulmann Co. v. Central Union Trust Co., 257 N. Y. 563, 178 N. E. 796, so it is not accepted as authority or relied upon, although it may be classified as one of the "imposter" cases, with which we are not here concerned.

In our opinion, the difficulty in the instant case is, in view of the facts, created by the theoretical significance attached to the second signature. We do not question the proposition that the intention with which the check is drawn is all-important to a decision as to whether or not it was drawn to a fictitious payee. We reassert said principle. There is, however, no more reason to say that the intent must be that of a cosigner than to say it must be that of the actual maker, to wit, the corporation. The controlling intent is that of the person who within the scope of his authority does the final thing which gives vitality to the check or who places it in circulation. In this case, if the two cosigners of the checks were participants in the fraud, no one would question the responsibility of plaintiff. Respondent in fact concedes responsibility if this be assumed. Yet the plaintiff employer, the actual maker, would have had no actual intention of drawing the checks in such assumed situation any more than did the employers in the cases where they were the actual makers but in which authority to draw checks had been given to a single person.

It is common business practice for companies to require two persons to sign checks as a condition precedent to their validity. Not infrequently, however, one of the signers will sign a number of checks in blank, thus, in effect, relying upon his cosigner to formulate the intention of the drawer of the check, to wit, the corporation. How does such a situation differ from one in which a single signature is required? The cosigner does not, any more than the corporation, have and does not intend to have any active part in the actual drawing of the check. Such cosigner affixes his signature within the scope of his authority. Life is fused into the check by the one who finally signs. If it is just or logical to say that the cosigner relied upon his colleague to draw only proper checks, then it is fully as logical and just to say that a corporate employer which authorizes a single signature places its reliance upon the same belief. The practical fact of the matter is that the confiding cosigner or corporation, or both, has or have no specific intent with reference to such checks, whether they were properly or improperly drawn, and that the only specific intent with reference to such checks is that of the person who within the scope of his authority gives them life.

On the facts of this case the cosigners of Downs were mere automatons. Their names on the instruments gave them no more validity than did the corporate name printed thereon. They had just as much general intent with reference to the instruments involved as their corporate employer, and no more. For all practical purposes their names as well as that of the corporation might have been printed upon the checks. It is difficult to understand why any insurmountable legal barrier is created merely because on the facts in this case cosigners were required to affix and went through the motions of affixing their names at the time the checks were in the process of being drawn. If the cosigners had signed the checks in question in blank, then based upon every rule of reason and on the clear authority of the San Carlos Case, supra, the checks were "bearer" checks. It would be no answer to say that authority to sign in blank was not given, for the act of signing would be within the scope of the authority of the cosigners. The facts in this case establish beyond cavil that the cosigners did, as a practical matter, sign in blank.

It may be assumed that theoretically the purpose of two signatures is to establish a check between cosigners in addition to such supervision as exists always in the board of directors. Theoretically there is always supervision between a single signer and the board of directors as well as between such signer and intermediate officers of greater authority. But the mere fact that the board of directors or such superior officers do not in fact or in time exercise such restraint or supervision, does not prevent a check drawn by a single signer under the circumstances here detailed from becoming "bearer" paper.

It may be urged that in the case of a single signature there is a proper delegation of authority from the board to the single signer, and that such single grant of power makes it conclusive upon the corporation, whereas, where it is a delegation of power to two, one cannot delegate to another. We are not, however, here concerned with the rule that one agent cannot delegate his authority to another. Here there is no question of delegation of power. The cosigners with Downs each exercised their power, but did it in a manner so careless that the corporate employer would have been as secure if no grant of power had ever been made to such cosigners to cosign checks. This power having been granted, however, and having been exercised by the cosigners within the scope of their authority is as binding upon the corporation as if it had been exercised with the greatest of prudence.

It may be justifiably assumed that it was not contemplated by the corporation that the cosigners of Downs were authorized to sign checks in blank or checks unsupported by the proper vouchers or merely because Downs had already signed them, and yet if they had signed under any such circumstances the checks so signed by them would be binding upon the corporation because they were acting within the scope of their authority. The fact is that they did so sign repeatedly under the two latter situations and, in practical effect, signed altogether as if they had signed in blank.

It has undoubtedly been noted that in the foregoing we have designated the exercise of authority by the cosigners as "in a manner so careless." The phrase has been deliberately used, but it should be made clear that this decision is not rested upon negligence as such as between the respondent and appellant. The use of the phrase is confined to the effect which we believe the conduct of the cosigners has in fixing the character of the checks involved as "bearer" paper.

Appellant does assert most vigorously that it should be freed from liability on the ground of negligence alone. We do not agree with this contention. The identical defense was urged in the Home Savings Bank Case, supra. The authorities are there summarized and the court held on similar facts that the negligence of the employers (if any) cannot be classified as a direct and proximate cause of the cashing of a check on a forged signature by the bank. It was further held in that case that the bank's responsibility is not grounded in tort but upon its contractual liability "to pay out the depositor's money only on the order of the depositor and in accordance with that order," and that the further question of the negligence of the maker of the checks was not therefore germane. Aside from the fact that the negligence asserted, if any were found, is unrelated to the alleged negligence of the bank, it was directly held in the Home Case, supra, that a large corporation, conducting its business as did the plaintiff here, is not on the facts validly subject to a charge of negligence because one officer performing within the scope of his authority without investigation acts upon facts submitted by some employee acting within the scope of his authority. The Home Case, however, as well as all of the cases in which the banks are held liable, involve frauds perpetrated by employees who had no authority to draw checks but who nevertheless caused such checks to be drawn by imposing upon officers who did have such authority.

It may be conceded, as a matter of logic, that if it has been held that a corporation is not negligent when an employee under the circumstances outlined by the facts imposes upon an officer, there is greater reason for holding a corporation free from negligence when the information upon which action is taken is submitted by an officer of the corporation with some executive powers to an employee or another officer who must act thereon. If this be so, there would be no negligence in the instant case on the part of the cosigners of Downs. Such conclusion, however, does not affect the propriety of determining whether or not the conduct of the cosigners of Downs was such, that the legal result is that Downs alone was the person who made the checks payable to fictitious payees and that he alone fixed the character of the paper to be uttered and circulated for the corporation. The conduct of the cosigners, whether it be considered negligence or not, while entirely unrelated to that of the alleged negligence of the bank, is nevertheless binding upon their corporate employer, when the question to determine, is the nature and effect of the act of the corporation without reference to any act of the bank. Otis Elevator Co. v. First National Bank, 163 Cal. 31, 124 P. 704, 41 L. R. A. (N. S.) 529; Edelen v. Oakland Bank of Savings, 39 Cal. App. 302, 178 P. 737.

In the line of cases in which the banks have been held responsible, the employees, who perpetrated the frauds, never could do anything to make the checks valid. In such cases, the intent of the employees is beside the mark, since it is beyond the scope of their authority to draw checks for their specific fraudulent purpose or for any lawful purpose; their intent is never binding on the corporation. In the language of one of these cases, "his intention in regard to the check was of no importance, for he had nothing to do with giving it vitality." U. S. Cold Storage Co. v. Central, etc., Bank, 343 Ill. 503, 507, 175 N. E. 825, 826, 74 A. L. R. 811. In this type of case, the signer of the checks could take it for granted that once the check was completed, it would have to be used for the purpose for which the signer intended it to be used, or it would not be an obligation of such signer's employer. In these cases the faithless employees have no authority other than to receive the checks after their execution and deliver them to the payees. Again quoting from the foregoing Illinois case: "If this was the fact, and if instead of delivering the checks, as it was his duty to do, he abandoned his agency and disregarded his duty, and, converting the checks to his own use, forged the names of the payees, cashed the checks, and received and appropriated the proceeds to his own use, his acts were neither within the scope of his authority nor in the course of his employment." U. S. Cold Storage Co. v. Central, etc., Bank, supra, 518 of 343 Ill., 175 N. E. 825, 831. In the case at bar the cosigners of Downs had no such legal security. On the contrary, it must be assumed that they knew that until Downs had signed the check it was no check.

We are thus impelled to one of two conclusions. The corporate respondent in this case recognized how impossible it would be for cosigners to make even a cursory investigation of checks submitted by Downs and did a useless thing by requiring cosignatures; or it was the intention of the corporate employer that, whether checks were submitted by Downs or by whomsoever submitted that such checks be investigated by the cosigners. It is fair to assume that of the two, the latter was the intention of the corporate employer. The board of directors of respondent was not ignorant of the fact that between 3,000 and 5,000 checks were drawn each month. The board must have known that it takes time and care to inquire into that many transactions. Yet by its mandate, certain individuals were selected to perform this duty. These individuals omitted to investigate and supervise, as directed, but inasmuch as they, by signing, acted within the scope of their authority, their act is as binding upon their principal as if they had signed in blank, or as if they had actually known what they were doing. If the corporate employer of Downs did not intend the cosigners to investigate, but merely required them to sign their names so that they could attain perfection in that respect, then such cosigners were performing a useless automatic act which could require no intent and it was clearly the intention of the corporate employer to allow Downs and Downs alone to fix the character of the checks and give them vitality. If this be so, then the intention of Downs is controlling and the checks are "bearer" paper.

There is another cogent reason why the check in this case must be held to be payable to bearer irrespective of the method of signature or the knowledge of those who signed. The uncontradicted fact is that an officer of the plaintiff who had an unquestioned right to circulate and deliver checks, and this without advising any one of his intention to circulate and deliver such checks, knew that they were payable to a nonexisting person but nevertheless proceeded to place said checks in circulation. As to this phase of the case, the court in American Sash & Door Co. v. Commerce Trust Co., 332 Mo. 98, 56 S. W. (2d) 1034, 1043, says:

"The knowledge and intent of the maker in putting the check in circulation would therefore be pertinent (Shipman v. Bank of N.

Y., supra, 126 N. Y. loc. cit. 330, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; Harmon v. Old Detroit Nat. Bank, 153 Mich. 73, 79, 116 N. W. 617, 17 L. R. A. [N. S.] 514, 126 Am. St. Rep. 467), and if a maker should draw a check not knowing the payee to be nonexistent or fictitious, but should nevertheless utter it after learning that fact, we should say the check would be payable to bearer. Similarly, if one authorized officer of a corporation, say, should thus innocently draw the check, and another officer with discretionary power to deliver should put the check into circulation knowing the payee to be fictitious or nonexistent, it would seem the same result should follow."

Again, it must be borne in mind that the situation with respect to an officer who acts within the scope of his authority is entirely different from the situation treated in those cases wherein the banks are held responsible. In the latter type of case, the employee has no authority except to deliver to specifically named payees who are believed to be bona fide existing persons by the signer or signers who have authority to make a check. On the facts of this case, Downs had the authority to deliver checks to any one and every one, real or fictitious. Since he acted within the scope of his authority, his act, intent, and knowledge, though adverse to and a fraud upon his principal, are nevertheless binding upon his principal. Otis Elevator Co. v. First Nat. Bank, 163 Cal. 31, 40, 124 P. 704, 708, 41 L. R. A. (N. S.) 529. In the case here cited the court said: "Of course the preparation and presentation to appellant for payment by Bliss of checks which were valid and unaltered checks of respondent, payable to 'cash' or 'bearer' or indorsed to Dickinson, were acts within the scope of and in the direct course of his employment. And, while it is true that, as to the presenting of forged or altered checks, Bliss was acting without the scope of his authority which authorized him to present only valid checks, still, as far as the appellant bank is concerned, Bliss, in the preparation and presentation of this altered check, was acting within the direct scope and course of his employment which consisted in preparing and presenting checks of respondent payable to 'cash' or 'bearer,' or to the order of Dickinson for payment by it. * * * In the application of the rule we have been considering, it is of no consequence that the check here in question presented by Bliss was in fact a forgery on his part. The rule is based on the fact that, as to the particular transaction, the agent had exceeded his authority, actual or apparent. Whether in doing so the agent has been guilty of a breach of faith with his principal or has committed a crime, is of no controlling moment as affecting the responsibility of the principal to third persons injured thereby. It is enough to fix the responsibility of the principal in behalf of an innocent third party if the agent, though acting criminally, was nevertheless in perpetrating a fraud thereby on said third party acting within the course of his employment." In the Otis Elevator Case the court, before making application of the above principle to the facts of that case, said: "Our attention has not been directed by counsel on either side to any case presenting a similarity of facts to those presented here. But there are principles of law which in their scope have been made applicable in cases which, while not identical as to facts, yet are sufficiently analogous to make the doctrine therein laid down applicable here." The court then cited and discussed in some detail the cases upon which it bottomed its decision.

In the other set of circumstances an employee, whose intent is immaterial so far as it becomes a binding part of the animus of his principal, is instructed to perform a ministerial act, to wit, to deliver a check to a person assumed to be existing and named therein. If the assumed person does not exist, the employee, so far as the scope of his authority is concerned, can function no further and if he did it would not be binding upon his employer. Thus in the case of American Sash & Door Co., supra, page 1043 of 56 S.W.(2d), it is said: "For, where the authorized officer of the corporation draws the check in ignorance of the fact that the payee is fictitious or nonexistent, and the check is put in circulation by an employee acting outside the scope of his authority, the statute does not apply and the check is not payable to bearer because in such circumstances the corporation would be without either actual or constructive knowledge of the fictitious status of the payee." In the Otis Elevator Case, supra (at pages 47 and 48 of 163 Cal., 124 P. 711), the court recognizes this distinction.

[6] It has been well settled that when negotiable paper, regular on its face, is delivered or circulated by the maker thereof, with indorsements thereon, such indorsements will be deemed valid and genuine in the hands of a bona fide holder. The rule is stated in 2 Morse on Banks and Banking, par. 477, as follows: "Whatever signature or endorsement is upon an instrument when issued by the drawer or maker will be deemed good against him in the hands of a bona fide holder. His deliv-

ery of the paper affirms its correctness, and if the name be forged the amount paid on the bill may be recovered by the drawee from the drawer."

In the case of Litchfield Shuttle Co. v. Cumberland Valley National Bank, 134 Tenn. 379, 183 S. W. 1006, 1007, which dealt with the effect of circulating a check by the maker after an indorsement of the payee's name had been forged, the defendant bank defended on the ground that it paid such check pursuant to the direction of those who had authority to represent the drawer of the check and direct the payment of the funds of such drawer. The court said: "So far as the bank was concerned, Hooper (the employee who drew the check forged the payee's name and thereafter circulated it) had authority to draw the checks in controversy and had authority to put them in circulation. Complainant's auditor testified that the indorsements on the checks in suit were in the handwriting of Hooper. Therefore, when the checks were issued by Hooper, who had authority to draw and issue them, they already bore the indorsements said to have been forged. * * *

"These checks appear to have been cashed or to have been put in circulation by Hooper himself, complainant's superintendent. They bore the forged indorsements at the time they were negotiated by Hooper, and in view of this conduct of complainant's representative, within the apparent scope of his authority, we think complainant is not entitled to relief against the bank. * * *

"When Hooper negotiated these checks, under the provisions of section 65, he warranted that they were genuine and in all respects what they purported to be. * * *" The section 65 referred to is the same as section 3146 of our Civil Code.

In the same case the court concludes by saying:

"When the complainant by its general manager issued these checks bearing the indorsement of the several payees, it thereby admitted the genuineness of the signatures, and it is now precluded from asserting to the contrary. When the bank paid these checks thus vouched for by the duly authorized agent of the complainant, such payment was according to the drawer's own order or pursuant to the direction of one who had authority to represent the drawer." Page 1008 of 183 S. W.; Otis Elevator Co. v. First Nat. Bank, 163 Cal. 31, 124 Cal. 704, 41 L. R. A. (N. S.) 529.

The Hackensack Case, supra, referred to as an anomalous case, was evidently decided on this theory. In that case there were dual signatures required. The court found, however, that the corporation employer required only one signature, to wit, that of Wallace, the faithless employee. The defendant bank for some reason required two signatures. The president of the corporation testified that he signed because the signatures of two officers were required at the Hackensack Trust Company. Wallace was in sole charge of all the corporation business as manager, and was the sole person who had knowledge with reference to the checks. The president signed because he was required to do so, and knew nothing about the checks. The court gave as one of its reasons: "* * * As it was conceded that Wallace had practically sole charge of all the corporation's business as manager, and as he drew the checks and put them in circulation with full authority, his acts and intent must be deemed the act and intent of the corporation." Hackensack Trust Co. v. Hudson Trust Co., 119 Misc. 689, 197 N. Y. S. 158, 159.

It follows from the above, therefore, that even with reference to Plaintiff's Exhibit 33, which was a check for $4,881.52 which was signed on behalf of respondent by C. C. Biehl, its cashier, and one P. H. Sullivan, but which had been prepared by Downs and which, like the other checks, was drawn to a fictitious payee, but which check was circulated and delivered by Downs, is likewise a bearer check and falls in the same classification as the other 69. Downs, an executive officer and one who was duly authorized to circulate checks on behalf of the respondent, knew that the check was drawn to a fictitious payee but did nevertheless circulate the same, and his knowledge is binding upon the respondent.

In view of the conclusions reached it becomes unnecessary to consider the questions of negligence, to which reference has already been made, estoppel, laches, whether or not the rendition of monthly statements by appellant to respondent constituted an account stated, particularly since all of said questions are treated and answered in the case of Home Savings Bank, supra.

The conclusion reached as to the meaning of the language of subdivision 3, section 3090, of the Civil Code, "known to the person making it so payable" is, we feel, "neither arbitrary nor fanciful, but is both just and equitable. The owner of the funds trusts its agent. It tells the bank to pay out its funds on his order. As between him and the bank, the latter is bound to pay whomsoever he will. If any particular check is paid to a person whom he intended to receive it, the bank has done precisely what it was instructed to do. In such cases as that here involved, it is true that the agent has proved false to his trust, and some innocent person must be the loser. Should it not be the one who gave him the power which he misused?" Norton et al. v. City Bank & Trust Co. (C. C. A.) 294 F. 839, 845.

The judgment for plaintiff is reversed, and the judgment for cross-complainant Wells-Fargo Bank against cross-defendant Los Angeles First National Trust & Savings Bank likewise is reversed.

We concur: CONREY, P. J.; YORK, J.

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KALE v. BANKAMERICA AGRICULTURAL CREDIT CORPORATION.

Civ. 5082.

District Court of Appeal, Third District, California.

Nov. 8, 1934.

1. Animals 🔑26(1)

Agistor's lien cannot be acquired where animals are not pastured on claimant's land or are not in claimant's possession.

2. Appeal and error 🔑907(3)

Where complaint was founded on express contract and judgment was based on theory that contract was contract of compromise, it would be assumed on appeal on judgment roll alone that evidence of compromise was properly admitted without objection and that such evidence supported findings and judgment.

3. Frauds, statute of 🔑18(2)

Where plaintiff consented to allow mortgaged sheep to be removed from plaintiff's premises only after mortgagee agreed to pay plaintiff's bill for feed previously furnished the sheep, mortgagee's promise was original and not invalidated by statute of frauds.

4. Appeal and error 🔑926(5)

Where judgment was based on oral contract, it would be assumed on appeal on judgment roll alone that testimony covering oral contract was properly admitted without objection.

5. Contracts 🔑68

Compromise of disputed claim is sufficient consideration for a promise.

Appeal from Superior Court, Yolo County; Forrest A. Plant, Judge.

Action by Lee Kale against the Bankamerica Agricultural Credit Corporation. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Huston, Huston & Huston, of Woodland, for appellant.

White, Miller, Needham, Harber & Mering, of Sacramento, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a money judgment in favor of plaintiff and respondent and against defendant and appellant, the appeal being upon the judgment roll alone.

The first cause of action alleged in the complaint was for hay sold and delivered to the defendant at defendant's request, but apparently no evidence was introduced upon that cause as no findings appear in the judgment roll on that issue.

In the second cause of action it is alleged in substance that for some time prior to January 30, 1932, approximately 1,500 head of sheep belonging to one Fusco were on the real property of plaintiff, and that these sheep were subject to a chattel mortgage given to secure the repayment of a promissory note by Fusco to Bankamerica Agricultural Credit Corporation, appellant herein. Prior to the commencement of this action, plaintiff had, so it is alleged, at the request of Fusco, furnished hay for the use of the sheep in excess of $1,500. Defendant was desirous of moving the sheep from the property of plaintiff to another location some miles distant, but plaintiff refused to allow the sheep to be moved until his feed bill had been paid, whereupon defendant agreed that, if plaintiff would allow the sheep to be moved, it would pay the amount due, and plaintiff avers, relying upon the promise so made, consented to the removal. Defendant paid $1,000 on account, but has refused to pay the balance thereof. In the answer practically all of the allegations of the complaint are denied.

The findings are that approximately 800 head of sheep were pastured upon real property occupied under lease by Fusco, which property was contiguous to plaintiff. The court found the ownership of the sheep in Fusco, the existence of the mortgage in favor of defendant, and that plaintiff had furnished hay for the sheep at the request of the owner.

The court then found: "* * * That at no time in the said complaint or herein mentioned had said sheep been in the possession of said plaintiff, and said plaintiff then and there claimed in good faith to be entitled to the possession of said sheep until said sum of $1,587.00 was paid to him in full; that then and there the defendant claimed in good faith that Joe Fusco was entitled to the immediate possession of said sheep without first making said payment or any part thereof; that on or about the said 14th day of February, 1932, in settlement of said conflicting claims the defendant orally promised and agreed with plaintiff that if plaintiff would allow said sheep immediately to be moved as then and there desired and requested by defendant, the defendant would pay to plaintiff the said sum of $1,587.00. * * *"

The court further found that thereafter plaintiff relinquished all claim to said sheep and they were moved to other premises; then was found the fact on nonpayment, and judgment was entered accordingly.

Appellant maintains the findings do not support the judgment and that upon the findings as made, judgment should be entered for appellant, and also that the judgment was based upon a cause of action not alleged in the complaint.

[1] It is established by the findings that the sheep were not pastured upon the lands of plaintiff, nor were they ever in the possession of plaintiff, and therefore plaintiff never acquired an agistor's lien upon the sheep. It would therefore be true as appellant alleges, that it would be entitled to judgment thereon, if that were all that was found. But the court went further, however, and found that "* * * said plaintiff then and there claimed in good faith to be entitled to the possession of said sheep * * *," and that "in settlement of said conflicting claims," the corporation made the promise upon which the action was brought, which is sufficient to justify the final judgment as entered by the trial court.

[2] Appellant insists that the complaint being founded upon an express contract, it was without the issues to base a judgment for respondent upon the theory that the agreement between the parties constituted a contract of compromise. However, we have before us the judgment roll only and must assume that evidence of the compromise was properly admitted without objection and that said evidence supported the findings and judgment.

As was held in Freeman v. Gray-Cowan, 219 Cal. 85, 25 P.(2d) 415, that although it is the general rule a finding outside the issues must be disregarded, yet where the parties voluntarily submit and try an issue without any specified pleadings, they may not thereafter complain that the findings and judgment were not within the issues framed by the pleadings.

[3] Appellant also relies upon the statute of frauds but that, too, is answered adversely to appellant. From the findings it is apparent that defendant was desirous that said sheep be moved to another location and in view of the rule as laid down in the case of Garroway v. Jennings, 189 Cal. 97, 207 P. 554, where it was held that a promise, in consideration of an assignment of a judgment to pay certain attorney's fees incurred in the procurement of the judgment, was not a contract of suretyship or guarantee but an original obligation, so must the promise of appellant to respondent be deemed an original obligation.

Similarly, the case of Fuller v. Towne, 184 Cal. 89, 193 P. 88, where an indemnitor of a surety on a contractor's bond orally agreed to apply all moneys received under the building contract to the payment of claims, in consideration of the release of stop notices given to the owner in order that the indemnitor might collect the balance due on the contract, was held to be not within the statute of frauds. In Ogden v. United Bank & Trust Co., 206 Cal. 571, 275 P. 430, where a party having an oral contract to do certain work on a ranch refused to proceed further until the bank had agreed to be responsible for his compensation, and the continuance of the work enuring to the benefit of the bank, it was held that such contract was not required to be in writing.

[4] The objection that appellant is not responsible by virtue of the statute of frauds is further answered by the fact that the appeal being on the judgment roll, a reviewing court will, in support of the record, presume that the testimony covering the oral agreement was properly admitted without objection. 2 Cal. Jur. 425.

[5] Appellant also claims that there was no consideration for the promise on the part of the bank, but the findings evidence the fact that the compromise was of a disputed claim and it is therefore of itself a sufficient consideration.

"Where there has been a compromise of doubtful claims, or concessions and benefits given and received in good faith as consideration for a promise, the actual validity of the claims is immaterial; otherwise, as remarked by Mr. Wharton: 'There could be no compromise of litigation, since there is no litigation in which one or the other party, if the case be pressed to judgment, does not fail to make out his case.'" City Street Improvement Co. v. Pearson, 181 Cal. 650, 185 P. 962, 966, 20 A. L. R. 1317.

A different rule would apply where a claim was without any foundation or was advanced not in good faith, or based merely upon an arbitrary refusal to surrender the sheep. Such a claim could not then be regarded as a valuable consideration, but the findings before us are to the contrary and hold "that plaintiff in good faith set up his claim to the possession of the sheep."

The judgment must be and is hereby affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

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2 Cal.App.2d 92

McCALL v. McCALL.

Civ. 1128.

District Court of Appeal, Fourth District, California.

Nov. 7, 1934.

Hearing Denied by Supreme Court Jan. 3, 1935.

1. Husband and wife 🔑249

All property held by husband and wife is either separate property or community property.

2. Husband and wife 🔑266

Community property invested by one of spouses in partnership enterprise with another remains community property, though husband and wife may by agreement change their community property into separate property.

3. Husband and wife 🔑266

Partnership agreement between husband and wife and other parties under which property was conveyed to trustee *held* not to transmute interests of parties from community into separate property as respects division thereof on divorce of spouses.

4. Appeal and error 🔑763

Where action was tried on theory that property involved was community property and issue was whether partnership agreement had changed such property into separate property, wife cannot raise for first time, in additional brief on appeal, question that property was originally patented to her and that presumption that it was her separate property was not overcome (Rules of District Court of Appeal, rule 8, § 2).

5. Appeal and error 🔑659(1)

Motion for diminution of record would be denied where matter sought to be included could have no possible effect on outcome.

◆

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by Cora M. McCall against T. D. McCall. From an adverse judgment, plaintiff appeals and moves for diminution of record.

Motion for diminution of record denied, and judgment affirmed.

Ray D. Johnson, of El Centro, and D. C. Collier, of San Diego, for appellant.

M. W. Conkling, of San Diego, for respondent.

BARNARD, Presiding Justice.

The plaintiff and the defendant, while living together as husband and wife, acquired several hundred acres of land in what is now Imperial county. On April 4, 1925, they entered into a partnership with two brothers of the defendant and their wives with the purpose of improving this land by setting out trees or vines thereon, and of subdividing and selling the same in parcels. The partnership agreement provided that the plaintiff and defendant should convey the land to a corporate trustee, to facilitate the making of deeds to parties purchasing portions thereof; that the other partners should furnish funds with which to care for the groves to be planted and with which to pay the costs of subdividing and the other expenses; and that all proceeds, after paying the obligations of the partnership, should be applied as follows: (1) The other partners were first to receive all moneys advanced by them, without interest. (2) The plaintiff and defendant were next to receive $200 per acre for the land turned over to the partnership business. (3) All remaining profits realized were to be divided and one-third thereof paid to each couple, as joint tenants with the right of survivorship. In pursuance of this agreement, the land was deeded by the plaintiff and defendant to a corporate trustee which still holds the legal title. Part of the land was improved and some parcels were sold on contract, but it appears that in each case the buyer defaulted and the land went back. Subsequently, the defendant purchased, apparently with partnership funds, the partnership interests of his brothers and their respective wives and the corporate trustee is now holding title to the land in trust for the parties to this action.

This is an action for divorce on the ground of cruel and inhuman treatment. An interlocutory decree of divorce was entered in favor of the plaintiff, and the court found, with reference to the property, that the parties are the owners of all the property which was formerly owned by the "McCall Brothers, a copartnership"; that this copartnership had been dissolved more than one year theretofore; and that all of the property owned by the parties was acquired after their marriage and is community property. The court ordered the property divided equally between the parties, and the plaintiff has appealed from that portion of the interlocutory decree which affects the property rights of the parties.

The only point raised is that the evidence does not support the findings and judgment to the effect that the equitable interest of the parties in this property is community property. The appellant argues that it conclusively appears from the partnership agreement and from the conveyance of the land to the trustee, in pursuance of that agreement, that the interests of these parties were transmuted from community into separate property, and that she thereby acquired a one-sixth interest in the partnership property as her separate property and also a community interest in the copartnership interest held by her husband.

[1-3] All property held by a husband and wife in this state is either separate property or community property. Siberell v. Siberell, 214 Cal. 767, 7 P.(2d) 1003. Community property invested by one of the spouses in a partnership enterprise with another remains community property. Hulsman v. Ireland, 205 Cal. 345, 270 P. 948. There can be no difference in this respect where both husband and wife enter into such a partnership venture with other parties, investing their community property therein. Such an interest in a partnership is not a new kind of property, but takes its character, as separate or community, in accordance with how and when it was acquired. While a husband and wife may by agreement change their community property into separate property, no such agreement appears in this partnership agreement in so far as the land put into the partnership by these parties is concerned. While the partnership agreement provided that any profits which might accrue and be distributed to these parties should be received by them as joint tenants, no such a situation ever arose. There was no joint tenancy agreement, with respect to the value of the land put into the partnership by these parties, which value was fixed by the agreement and was never paid. And before the profit stage was reached the partnership was dissolved. In our opinion, this partnership agreement worked no such a transmutation as that contended for by the appellant, with reference to the property of which these parties are now the equitable owners, and the same remained community property if such it was at the time it was turned over to the partnership.

[4] At the conclusion of the oral argument the appellant was granted permission to file an additional brief. A brief was filed containing further argument on the original point raised and, in addition, raising for the first time the point that a part of the land in question was originally patented to the appellant, that it is therefore presumed that this land is her separate property, and that there is no evidence to overcome this presumption. The complaint filed by the appellant alleged that all of the property owned by her and her husband had been acquired since their marriage and was community property. In an amended complaint it was alleged that all of this property was, up to April 4, 1925, community property, and that on that date she and her husband entered into the partnership agreement above referred to. In an amended answer the respondent alleged that all property owned by the parties had been acquired after their marriage, through their joint earnings, and that the same was community property. So far as the property is concerned, the only issue at the trial was as to whether this partnership agreement had changed property which was theretofore community property into separate property. The point now raised was not included in the statement of questions involved, which is set forth on the first page of the appellant's opening brief, as required by section 2 of rule VIII of the rules governing this court. Neither in the appellant's opening brief nor in a supplemental brief filed by her nearly nine months later was this point mentioned, and the same may not be raised now for the first time, especially where a different situation was pleaded and where the trial was had upon another theory entirely.

[5] A motion for diminution of the record was taken under advisement, to be considered when the case was reached on its merits. The matter sought to be included in the record could have no possible effect on the outcome, and the motion should be denied.

The motion for diminution of the record is denied, and the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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1 Cal.App.2d 747

SMALLEY v. MOUNTAIN STATES LIFE INS. CO.

Civ. 5049.

District Court of Appeal, Third District, California.

Nov. 5, 1934.

1. **Evidence** 🔑357

Where issue was whether insured had contracted tuberculosis within 30 days of issuance of health policy, letter of doctor stating that, because of amount of involvement, insured had tuberculosis for fairly long time before taking out policy, was admissible to show basis of doctor's conclusion.

2. **Appeal and error** 🔑1058(1)

Where issue was whether insured contracted tuberculosis within 30 days after issuance of health policy, failure to admit letter from doctor stating that insured had disease for fairly long time before issuance of policy *held* not prejudicial error, where another doctor who had read record of case from which letter was copied was extensively cross-examined as to history of case (Const. art. 6, § 4½).

3. **Insurance** 🔑665(5)

Evidence sustained finding that pulmonary tuberculosis incapacitating insured was not contracted within 30 days of issuance of health policy so as to release insurer from liability.

4. **Appeal and error** 🔑996

Where facts established reasonably authorize one of two opposite inferences, decision of trial court adopting one and rejecting the other is conclusive.

◆

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Action by John Utellus Smalley against the Mountain States Life Insurance Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

J. F. Riley, of San Francisco, for appellant.

H. B. Churchill, of Santa Rosa, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment against the defendant in this action for compensation at the rate of $100 per month from the 26th day of March, 1930, to and including the 26th day of June, 1931. From this judgment the defendant appeals.

The judgment is based upon a health insurance policy executed and delivered by the defendant to the plaintiff on or about the 10th day of December, 1929.

The only question presented for consideration upon this appeal is whether the disease with which the plaintiff was found to be suffering by the court, and for which judgment was awarded from the 26th day of March, 1930, to and including the 26th day of June, 1931, was contracted or had its inception within 30 days after the 10th day of December, 1929. It being provided in the policy that, if the disease from which the plaintiff might subsequently suffer had its origin within 30 days of said date, compensation would not be allowed.

The court, after finding the issuance and delivery of the policy insuring the plaintiff against loss of time on account of disability resulting from disease, found that the cause of the disease originated more than 30 days subsequent to the 10th day of December, 1929, and that the disease from which the plaintiff suffered necessitated attention by a duly licensed physician, as required by the conditions of the policy. As the question of the time of the origin of the disease is the only issue presented, we need not set forth any of the conditions of the policy.

It is the contention on the part of the appellant that the evidence does not support the findings of the court, and also that the court erred in the exclusion of certain testimony hereinafter considered.

The record shows that the plaintiff went to the hospital on or about the 26th day of March, 1931, and was found to be suffering from tuberculosis. The plaintiff himself testified that he first noticed symptoms of the trouble about 10 days previous to his entering the hospital.

E. J. Helgren, the city health officer of the city of Santa Rosa, testified that the plaintiff worked for the city of Santa Rosa from approximately June 15, 1928, to somewhere around March 17, 1930; that he saw the plaintiff two or three times every day; that it was his duty to supervise the work of the plaintiff; that during that time the plaintiff was never sick; had done heavy work; that his work was plowing; using a tractor and horses; sowing grain; working in hay fields; and doing general work around the farm; digging ditches and other work. The plaintiff worked eight hours a day; was never sick; had plenty of color; was out in the sun all day; was, in fact, the picture of health; that he knew the plaintiff before the plaintiff went to work for the city and while the plaintiff was working for the Levin Tanning Company; that he never noticed any difference in the appearance of the plaintiff; that the plaintiff had had experience with "T. B." institutions; at the county hospital for 28 years; had taken samples of sputum; had learned of the doctors the symptoms of active tubercular patients from his 28 years' experience; that during the time he had known the plaintiff, outside of once in March, 1930, he had never noticed any symptoms of active tuberculosis; that the time here mentioned was on or about the 15th day of March, 1930, when the plaintiff was very pale and had a cough.

The witness Fraser testified that he was the superintendent of the Levin Tannery Company; that the plaintiff had worked for the company some 6 or 7 years; that he began work for the company in 1922, and, so far as the witness could remember, the plaintiff had never laid off on account of sickness; that the plaintiff always had a good color; appeared to be vigorous and strong; never saw him coughing or spitting; and that the plaintiff never complained of being tired or depressed.

Wesley E. Pfister, a farmer, testified that he had known the plaintiff about 25 years; was working with the plaintiff when he took sick; had been working with the plaintiff from January 30, 1930; that the plaintiff never showed any signs of sickness until a short time before he went to the doctor around the middle of March; that the physical appearance of the plaintiff was good. This witness also testified that he went hunting with the plaintiff every season, three or four times each season; that the plaintiff always did his share of the hunting; never heard the plaintiff complain of feeling badly or being fatigued or tired, any more than the rest of the hunters. This witness further testified that he never knew of the plaintiff having any coughing spells or complaining of fatigue or any sweats; never knew of the plaintiff being gassed.

The witness Peterson testified that he had known the plaintiff over 20 years; had observed his physical condition; had never known of the plaintiff being sick; that the plaintiff always appeared to have a good color, and was apparently strong.

The witness Tisserand testified that he had known the plaintiff about 12 years; had gone hunting with the plaintiff every year until he became sick; that the plaintiff always held up his end; could outhunt the witness, and, when it came to packing a deer or walking, always seemed to come in in better shape than the rest of them; never noticed any difference in plaintiff's appearance up to the time he was taken sick.

The witness Vivian N. Pfister, testified that he had known the plaintiff some 21 or 22 years; during 1928 and 1929 he was not with the plaintiff every day; had hunted with the plaintiff; gone to school with the plaintiff; observed his physical condition up to the end of 1929, up to which time the plaintiff had never seemed to be fatigued on the hunting trips; hiked with them, and generally seemed in good condition.

The witness Tisserand testified that he had known the plaintiff about 10 years; had gone hunting with him; saw him during 1928 and 1929; always thought he looked good; that the plaintiff always seemed to be the life of the party; that the plaintiff kept up his part of the hard work; that the plaintiff's condition, as to appearance, was all the same; that he did not see the plaintiff during the months of January and February, 1930.

The witness Mrs. Somner testified she had known the plaintiff about 20 years; during 1928 and 1929 he was working on the city farm and she saw him about three or four times a week; before that time, about once a week; had observed his physical condition; noticed his strength in swimming; that the plaintiff always looked healthy; that she had known the plaintiff during the years 1928 and 1929; saw him in December, 1929, January and February, 1930; during those months his appearance was very good up to the time he was taken sick; that he was taken sick along in March; noticed no difference during those 3 months than during the previous years.

Dr. Fales, a witness called on the part of the plaintiff, among other things, testified as follows:

"Q. Doctor, in your opinion, would it have been possible for the disease to have developed in Mr. Smalley within a period of time, as you found it? Within a period of time from January 11th to the 23d day of March? A. Considering the type of tuberculosis, it would have been possible.

"Q. It would have been possible? A. Yes.

"Q. As I understand, you testified that this was of a type that developed quickly? A. Yes.

"Mr. Riley: Q. Could it develop within two months? A. It is possible, I believe, for it to develop within two months.

"Q. Possible. Would it be likely, doctor, for such a condition as you have described to develop within that time? A. It is surprising how fast that develops in very many cases.

* * *

"Mr. Churchill: Q. Well, doctor, I hate to come back at you in this way—a person, a patient suffering from that type of tuberculosis, as Mr. Smalley was suffering from when he entered the hospital, that active stage, would that, or could that patient go on hunting trips and show no fatigue, work daily and show no fatigue, no coughing, no depressed or tired feeling, no sweat, no raising of sputum or any of the attendant conditions that are generally found in T. B., do you get my question? A. Yes.

"Q. Would that be possible? A. Very unlikely.

"Q. In other words, a man who had the type of T. B. that Mr. Smalley has had, in your opinion, would he be able to go out into the hills in the heat of the summer months, on the hot summer days and tramp the hills as hunters tramp, and carry deer in and keep up with the average ordinary man hunter, without showing any of the effects at all? A. No.

"The Court: Well, that is, if these conditions were present, if the infection were present? A. Yes, if the infection were present.

"Mr. Churchill: Q. The result of the examination of the sputum, does that in any way modify your opinion that this might have developed between January 11th and March 23d or 24th? A. Not at all, because this denoted breaking down of tissue to a certain extent, and tissue can break down in a few weeks after the beginning of the disease, lung tissue.

"Q. In other words, nobody knows anything about T. B.? A. That is pretty true."

Dr. Shipley, a witness called for the plaintiff, among other things, gave his opinion upon the statement of the facts presented to him as follows, to wit: "Q. Assuming, doctor, that Mr. Smalley, the plaintiff in this case, had an exudative type of tuberculosis, pulmonary tuberculosis, it appeared on or about March 27th he had an X-ray taken and was examined by a physician and that it appeared to be rather active and what we call an acute type, and there appeared to be an acute development of the infection, and that, at the time of such examination there was a suggestion of a cavity only, about the second interstice, a little below the clavicle in the right lung, and it did develop into a cavity under such an examination, a small cavity, and there was some fibrosis involved, and an infiltration, also of the upper lobe, to a certain extent there was some infiltration about the middle lobe, and also in the upper part of the lower lobe, from your experience, would you state in your opinion, whether or not such a condition could have developed from the inception of the infection within a period of two months? A. It could."

These are only excerpts from the testimony of the doctors who, in addition to what we have said, described with considerable detail the character of the affliction from which the plaintiff was found to be suffering. These descriptions, however, do not militate against the rights of the trial court to make its findings and draw its conclusions in accordance with the testimony just referred to. It goes only to the question of whether the disease did, in fact, have its origin within 30 days from the 10th day of December, 1929, or was of such a character that the inference could and should be drawn therefrom that the disease had its origin during that period, or long prior thereto. In support of its contention that the disease had its origin at a time probably prior to December 10, 1929, the defendant introduced the testimony of Dr. Kruse, who gave it as his opinion that the condition of the plaintiff as described to him would lead him to the conclusion that the disease had its origin several months previous to March 26, 1930, and also for a considerable period prior to December 10, 1929.

The testimony introduced in the record tended to show that the disease was acute and had advanced quite rapidly.

During the course of the trial, the defendant sought to introduce in evidence a letter written by one F. J. Herbig, a medical officer in temporary charge of the United States

Veterans' Hospital at Livermore, Cal., addressed to the defendant at Hollywood, Cal.

The testimony likewise shows that Dr. Fales did not come in contact with the plaintiff immediately upon the plaintiff entering the hospital, but did come in contact with him inside of a month after such entrance.

[1, 2] It appears from the record that the plaintiff gave instructions to the physician or officer in charge to send to the defendant the information contained in the letter, and Dr. Fales testified that he had read the record of the case from which the letter was copied. This letter was admissible for the limited purpose of showing the basis upon which Dr. Fales, to some extent, based his conclusions. However, the offer of the letter does not appear to have been made for such limited purpose, nor does the objection to its admission appear to be well taken. Notwithstanding these facts, the record does not exhibit anything from which this court could draw the conclusion that the defendant suffered any material injury. The defendant had an opportunity to and did cross-examine Dr. Fales extensively, and went into the whole question of the disease, the probability of its origin, old lesions, and everything connected with the physical examination of the plaintiff, and also whatever was exhibited by the X-rays, depicting the condition of the plaintiff's lungs, giving the court as full and complete an opportunity to weigh the testimony of Dr. Fales and make its findings of fact as though the letter had been admitted into the record. The letter referred to is as follows:

"Gentlemen: This patient's personal history shows that in infancy he associated with a sister who had pulmonary tuberculosis. At this time, no doubt, patient received his primary infection. In January, 1930, on account of not feeling well, consulted a physician who told him he had pulmonary tuberculosis. How long he had been suffering with manifest disease, before consulting the physician, we cannot say, but on account of the amount of involvement, it must have been a fairly long time.

"The diagnosis is 1710 tuberculosis, pulmonary, chronic, moderately advanced, active (a).

"The amount of pulmonary involvement is as follows: Right lung: Fibrosis and infiltration upper lobe, middle lobe and upper part of lower lobe. There is an area suggestive of a small cavity in the apex. Left lung: No infiltration. Fibrosis in the apex. It is too soon to give a prognosis at this time. Several months' observation is required to determine probable outcome.

"Very truly yours,

F. J. Herbig

"Medical Officer in temp. charge U. S. Veterans' Hospital, Livermore, California."

A comparison of the testimony in the record given by Dr. Fales shows that it covers everything save and except, perhaps, that certain relatives of the plaintiff had been afflicted with tuberculosis. From the fact that the quoted letter could only have been admitted and considered by the court for the limited purpose of showing a part of the basis upon which Dr. Fales founded his opinion, and the fact that Dr. Fales was subjected to a lengthy cross-examination, we cannot very well perceive how the ruling of the court prejudiced the defendant or led to a miscarriage of justice, so that the error, if any there was on the part of the court, comes within the provisions of section 4½ of article 6 of the Constitution.

While it is true, as contended for by the appellant, that no one testified as to the exact date when the disease resulting in the disability of the plaintiff had its origin, yet the court was presented with certain facts, conditions, and circumstances from which it was incumbent upon the court to make its inferences and arrive at a conclusion.

If there is any testimony in the record justifying the inference that the origin of the disease was not within 30 days after December 10, 1929, the judgment must be affirmed. The facts before the court show that the plaintiff exhibited his normal health and performed rather heavy labor up to and within a few days before he went to a hospital on March 26, 1930. The doctors testified that in their opinion, if the plaintiff had been suffering from tuberculosis, it was not probable that he could have done the work during said period which the witnesses testified that the plaintiff performed. They also testified that it was possible for the disease to have had its origin later than 30 days after December 10, 1929. The testimony of Dr. Kruse is to the contrary. The conflict in the testimony was for the solution of the trial court.

[3] What we have just stated we think presented to the trial court facts from which it might properly draw the inference that more than 30 days elapsed after December 10, 1929, before the disease with which the plaintiff became afflicted had its origin.

[4] While a number of cases might be cited supporting the authority of the trial court to

draw the inferences, make the findings, and come to the conclusions which appear in this record, we think the following excerpt taken from the case of Campion v. Continental Casualty Co., 94 Cal. App. 621, 271 P. 786, 787, is all that is necessary, to wit: "Where the facts established may reasonably authorize one of two opposite inferences and the trial court has adopted one and rejected the other, its decision is binding upon the appellate court, the same as where the trial court decides upon the weight of contradictory evidence. MacDermot v. Hayes, 175 Cal. 95, 170 P. 616. The findings of the trial court are to be liberally construed so as to uphold rather than to defeat its judgment. It is the province of the trial court to make any inference of fact from the evidence or from the facts found by it, and the appellate court will not draw a different inference from that drawn by the trial court to defeat its judgment. Paine v. San Bernardino, etc., Co., 143 Cal. 654, 77 P. 659; Breeze v. Brooks, 97 Cal. 77, 31 P. 742, 22 L. R. A. 257; People's Homes Sav. Bank v. Rickard, 139 Cal. 285, 73 P. 858."

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

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2 Cal.App.2d 21

McLEAN v. LADEWIG et al.

Civ. 5165.

District Court of Appeal, Third District, California.

Nov. 5, 1934.

1. Mines and minerals 🔑38(25)

In action to quiet title to mining property, judgment decreeing plaintiff to be owner of the "Good Luck Mine" as described in map and in accordance with monuments, followed by particular description differing from that in complaint, did not render judgment invalid, since, where mine was well known, description by name would have been sufficient (Civ. Code, § 1092).

2. Pleading 🔑433(3)

Defendants, having raised by answer issue of correct location of mine, could not contend, after judgment, that court had no authority to determine issue; word "issue" as used in statute being broader than complaint where answer enlarges it by introducing new matter (Code Civ. Proc. § 580).

[Ed. Note.—For other definitions of "Issue," see Words & Phrases.]

3. Mines and minerals 🔑19(2)

Generally, mining location is not rendered invalid by discrepancy between boundaries as marked on ground and those described in location notice, but, if ground markings are clearly ascertainable and can be definitely located, they will control as to extent and location of claim.

4. Mines and minerals 🔑38(19)

In action to quiet title to mining property, survey of property made by original locator, referring to natural objects and permanent monuments in vicinity, *held* sufficient to support judgment in favor of grantee of original location as against subsequent claimant, where survey covered same ground as that shown by map referred to in judgment.

5. Mines and minerals 🔑19(1)

Notices of location are to be liberally construed.

6. Mines and minerals 🔑38(2)

Grantee of original locators of mining property *held* entitled to maintain action to quiet title against rival claimants, where grantee and predecessors in title had been in adverse possession in excess of five-year period and sufficient ore had been taken out of mine to comply with law governing mining claims (30 USCA § 38).

7. Adverse possession 🔑86

Payment of taxes is not necessary to establish title by adverse possession.

8. Mines and minerals 🔑29(2)

To establish title by adverse possession to mine claim, vein on which claimant dug ore need not contain ore in paying quantities; it being sufficient if ore is found and prudent man would be warranted in spending his labors and means with reasonable prospect of success in developing a valuable mine.

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Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by Alice D. McLean against Karl M. Ladewig and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

H. H. Carleton, of Mariposa, and Robert H. Schwab, of Sacramento, for appellants.

Louis T. Milburn, of Mariposa, for respondent.

HELD, Justice pro tem., delivered the opinion of the court.

The amended complaint herein contains two causes of action; the first being the ordinary suit to quiet title, while the second alleges title by adverse possession. The property involved is an unpatented lode mining claim in the county of Mariposa, known as the "Good Luck Mine," which was located on February 1, 1892, by J. E. McLean, J. L. McLean, and S. B. Ferguson. By mesne conveyances, plaintiff has acquired all the right, title, and interest of the original locators in the property. The defendants claim the southerly portion of the Good Luck Mine by the location of the "Seventeen Fifty Mine," made by defendant Rae Ladewig on May 22, 1933. Judgment in the court below was for plaintiff, and defendants appeal.

The controversy here arises out of the fact that the location notice as posted on the Good Luck Mine, and as recorded in the office of the county recorder in 1892, described the center line of the mine as running from the point of beginning 1,200 feet in a northwesterly direction to a stake, and 300 feet from the point of beginning in a southeasterly direction to a stake. It is plaintiff's contention that, according to the monuments on the ground, the location notice should have read "north*easterly*" in the first-named course, and "south*westerly*" in the second. The result, in effect, is that the south*west* corner of the mine as described in the location notice becomes the south*east* corner of the mine as plaintiff contends it to have been marked on the ground. The location notice by defendant Rae Ladewig of the "Seventeen Fifty Mine" designates as its beginning point "the southwest corner of the Good Luck Mine." If this refers to the southwest corner described in the location notice of the "Good Luck Mine," the "Seventeen Fifty Mine" location overlaps the Good Luck Mine, as plaintiff contends it to exist according to the monuments on the ground. Defendants' contention is that the location notice recorded in 1892 governs, and that the eastern boundary of the "Seventeen Fifty Mine" is the western boundary of the Good Luck Mine, as that western boundary is described in the location notice.

It is plaintiff's position that the monuments as erected on the ground control over the description and courses as contained in the location notice. Plaintiff claims also by adverse possession, and it is her contention that the evidence establishes an adverse holding by her predecessors and herself for a period in excess of forty years of the area defined by plaintiff's monuments, and plaintiff argues that such adverse holding dispenses with the requirements of posting and recording notice of location.

[1, 2] The first point made by appellants is that the findings and judgment do not follow the complaint in regard to the description of the property. The amended complaint alleged ownership of the possessory interest in, and possession of "all that certain mining claim known as the Good Luck Mine." Then follows a reference to the date of the location, the record thereof, and a more particular description. The judgment decrees plaintiff to be the owner, in possession of and entitled to the possession of the "Good Luck Mine, as described in accordance with the map introduced in evidence and marked Plaintiff's Exhibit B, and in accordance with the monuments erected on the ground." Then follows a particular description, which varies from the particular description in the amended complaint. Appellants contend that the trial court found plaintiff to be the owner of different property from that which was described in the pleadings. In this, we think, appellants are in error. The subject-matter of the action is "the Good Luck Mine." A conveyance by that designation would be sufficient. Civ. Code, § 1092; 41 Cor. Jur. 401. Where property is well described by name, a subsequent particular description cannot be held intended to be used in the sense of restriction. Haley v. Amestoy, 44 Cal. 132; Martin v. Lloyd, 94 Cal. 195, 29 P. 491; 9 Cal. Jur. 294. Furthermore, defendants by their answer raised the issue as to the correct location on the ground of "the Good Luck Mine." Having gone to trial on that issue raised by their answer, defendants may not now successfully contend that the court had not authority to determine the same. By section 580 of the Code of Civil Procedure, it is provided that the court may grant plaintiff any relief consistent with the case made by the complaint and embraced within the issue. In Baar v. Smith, 201 Cal. 87, 255 P. 827, 832, it is said: "The word 'issue' as used in this Code section is broader than the complaint where the answer enlarges the same by introducing new matter. * * * It is also true that the parties may voluntarily submit and try an issue without any specific pleadings and thus be estopped from complaining thereat after judgment."

To the same effect is Freeman v. Gray-Cowan, Inc., 219 Cal. 85, 25 P.(2d) 415.

Appellants question the sufficiency of the description found in the judgment. As already stated, a description by a popular name is sufficient. Furthermore, the particular description in the judgment refers to "the map introduced in evidence and marked Plaintiff's Exhibit B." A map so marked is a part of the record herein. Also reference is made to the monuments erected on the ground. In Newport v. Hatton, 195 Cal. 132, 231 P. 987, the Supreme Court cites 33 Corpus Juris, p. 1209, as authority for the declaration: "That the judgment may be aided by intendments and additional data drawn from the pleadings and other parts of the records, or even, in some cases, by extrinsic documentary evidence."

The court then says at page 156 of 195 Cal., 231 P. 987, 996: "We do not see how a judgment can be pronounced a nullity for uncertainty of description unless the court can see that nothing is described. Those claiming under it must rely on the description, it is true, but whether or not the description is defective must be tested by rules of evidence ordinarily applied to the subject."

Permanent improvements may be treated as monuments. Hamaker v. Pacific Gas & Electric Co., 59 Cal. App. 642, 211 P. 265. Parol evidence is admissible to identify the map. Redd v. Murry, 95 Cal. 48, 24 P. 841, 30 P. 132.

[3, 4] Plaintiff concedes that the location notice does not describe the Good Luck Mine in accordance with the monuments which at the time of the location were erected on the ground. She contends, however, that such monuments control over the description and courses as contained in the location notice. It is said in 40 Corpus Juris, p. 807: "As a general rule, a mining location is not rendered invalid by a mere variation or discrepancy between the boundaries of a claim as marked on the ground and the courses and distances described in the location notice or certificate. In such a case if the markings on the ground are clearly ascertainable and can be definitely located they will control, as to the location and extent of the claim."

John E. McLean, one of the original locators of the mine, was a witness in the lower court, and testified that on the day preceding the giving of his testimony he had visited the "Good Luck Mine" and identified the point of discovery as made by him in 1892. He described that point of discovery, as well as the south center monument, both of which were found intact, and to be in the location designated on the map introduced in evidence as Plaintiff's Exhibit B. The surveyor who prepared the map was present when the witness McLean visited the mine during the trial, and prepared the map with reference to the location of the discovery point referred to by McLean. The surveyor also testified to evidence of mining operations in or near the line from the point of discovery to the south center stake. The witness McLean described the general direction of the vein of the Good Luck Mine to be northeasterly, and that it was upon this vein that the notice of location was posted. He testified also that when the location was made, he established monuments, and marked the boundaries of the claim. The witness Ward testified to the location of the southwest corner of the Good Luck Mine, and the witness Tresidder by measurement located the south center monument. We think the evidence shows clearly that McLean at the time of his location marked out on the ground the tract contained in the particular description of the Good Luck Mine as shown by the map, Plaintiff's Exhibit B, referred to in the judgment. The natural objects or permanent monuments referred to in the instant location notice are "the ridge east of Lyons Gulch," "William Dougherty's Spring," "Frank Lord's residence," and "Charles Frank's Ranch." All of these are presumed to be well-known natural objects or permanent monuments until the contrary appears. Hammer v. Garfield Mining & Mill. Co., 130 U. S. 299, 9 S. Ct. 548, 32 L. Ed. 964.

[5] Notices of location are to be liberally construed. McCann v. McMillan, 129 Cal. 350, 62 P. 31; Carter v. Bacigalupi, 83 Cal. 187, 23 P. 361; Mitchell v. Hutchinson, 142 Cal. 404, 76 P. 55. At 40 Corpus Juris, p. 805, it is said in referring to the sufficiency of the location notice: "If it is made in good faith, it should receive a liberal and reasonable construction in favor of the locator; and if by such construction the language employed in describing the claim, when taken in connection with the markings on the ground and other surrounding circumstances, will enable a reasonably intelligent person to find the claim, and trace its boundaries, and therefore imparts notice thereof to subsequent locators, it is sufficient."

We conclude, therefore, that the original location herein was valid and covered the premises described in the judgment.

[6] The contention of plaintiff that title by adverse possession has been established is, in

our opinion, sustained. The effect of section 2332, U. S. Revised Statutes (30 USCA § 38), has been held to be a declaration that possession for the statutory period is the equivalent of a valid location. Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 45 P. 1047; 40 Cor. Jur. 779.

In Humphreys v. Idaho Gold Mines Development Co., 21 Idaho, 126, 120 P. 823, 827, 40 L. R. A. (N. S.) at page 826, it is said: "It seems to us that the provisions of section 2332 of the Revised Statutes of the United States [30 USCA § 38] are intended to obviate the necessity for proof of posting and recording a notice of location in cases where the claimant to mineral ground has been in the actual, open, and exclusive possession of the ground for a period equal to that required by the local statute of limitations governing adverse possession of real estate."

[7, 8] It appears abundantly from the evidence here that the plaintiff and her predecessors in title have held and worked the "Good Luck Mine" as described in the judgment for many years in excess of five years. The payment of taxes is not required to establish title by adverse possession (Dalton v. Clark, 129 Cal. App. 136, 18 P.(2d) 752), and the parties stipulated on the trial that all assessment work had been done. The evidence seems to us clear that the location in question was established upon a vein or lode of practical value. The witness John E. McLean testified that he had taken several thousand dollars in gold from the mine. The witness Marre described the course of the main vein in the lode. The law does not require that the vein contain ore in paying quantities. It is enough if ore is found and the indications are sufficient to warrant a prudent man in spending his labor and means, with reasonable prospect of success, in developing a valuable mine. Garibaldi v. Grillo, 17 Cal. App. 540, 120 P. 425; see, also, Springer v. Southern Pac. Co., 67 Utah, 590, 248 P. 819.

In view of the conclusions which we have reached, it is not necessary to consider the contention of plaintiff that the general rule that the plaintiff must recover on the strength of his own title does not apply here. Richardson v. McNulty, 24 Cal. 339; Bradley v. Lee, 38 Cal. 362. Defendants cite Schroder v. Aden Gold Min. Co., 144 Cal. 628, 78 P. 20.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

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2 Cal.App.2d 103

COLLINS v. WELSH.

Civ. 9539.

District Court of Appeal, First District, Division 2, California.

Nov. 8, 1934.

Hearing Denied by Supreme Court Jan. 7, 1935.

1. Appeal and error ⚷1039(2)

That count for agreed price for legal services performed did not state cause of action in favor of assignee because of failure to allege assignment did not warrant reversal where count for reasonable value of services alleged assignment, client was not misled, stipulation showed that attorney was owner of claim and that assignee represented him in trial of action, existence of assignment was assumed, and attorney's testimony as to assignment was clear (Const. art. 6, § 4½).

2. Assignments ⚷137

Assignment must be proved by clear and positive evidence.

3. Divorce ⚷197

In action for attorney's fees for services rendered wife in divorce proceeding, that trial court made original allowance of $300 as attorney's fees did not fix value of services to be performed nor free wife from her obligation for services thereafter rendered.

4. Divorce ⚷228

Award of counsel fees to wife at beginning of divorce proceedings, which rest in discretion of trial court, is to enable wife to proceed with litigation and amount awarded is not determination by trial court of reasonable value of all legal services to be rendered thereafter.

5. Divorce ⚷197

In action for attorney's fees for services rendered wife in divorce proceeding, verdict of $15,000 was not excessive where community property approximated $500,000, and attorney negotiated settlement by which all of community property, except stock worth $12,750, was turned over to wife on her payment to husband of $117,500, which was satisfactory settlement to wife.

6. Attorney and client ⚷140

In determining reasonableness of attorney's fees amount involved in litigation and success of attorney's efforts must be considered.

7. Appeal and error ⚷1039(2)

In action for attorney's fees in which complaint contained count for reasonable value of services rendered and count on express agreement, that express agreement did not warrant recovery did not warrant reversal of

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

judgment for attorney where it did not appear that recovery was had on express agreement or that attorney was awarded more than reasonable value of services rendered.

8. Appeal and error ⚷1067

In action by assignee on claim for attorney's fees, that instruction failed to require finding that claim had been assigned to assignee *held* not prejudicial where client received stipulation during trial that attorney was owner of claim and that assignee represented him in trial of action and evidence showed that assignment had been made.

◆

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Margaret Collins against Josephine Welsh. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Seibert L. Sefton, of San Francisco, for appellant.

M. Mitchell Bourquin and William F. Herron, both of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff, as assignee of Vincent W. Hallinan, brought this action to recover the sum of $15,000 upon a claim for attorney's fees. Upon a trial by jury plaintiff had judgment for the full amount claimed. Defendant appeals from said judgment.

There are certain conflicts in the evidence, but in support of the judgment we must consider the evidence most favorable to plaintiff. It appears that Vincent W. Hallinan, assignor of plaintiff, acted as the attorney for defendant in a divorce action instituted by her; that at the time he accepted said employment there was no agreement made concerning his fees; that the property owned by defendant and her husband consisted of real estate and securities of a value in excess of $500,000; that of said property defendant claimed as her separate property the home valued at $25,000 and certain securities of the value of $17,000; that the remainder of said property was community property and consisted of several parcels of real estate and stocks, which stocks were of the value of approximately $12,750; that the most valuable piece of said community property consisted of a hotel in San Francisco upon which defendant herself had placed a value of $500,000; that while the period over which the attorney's fees extended covered less than three months, numerous items of service were involved before a property settlement was effected and the interlocutory decree was procured by the wife; that shortly after the filing of the complaint in said divorce action, said attorney had been substituted in the place and stead of another attorney who had commenced the proceedings; that he thereupon drew amended pleadings, caused an order to show cause to be issued, and obtained a restraining order; that he obtained for defendant an allowance of $750 per month for support and an allowance on account of attorney's fees in the sum of $300; that thereafter the restraining order was dissolved by the court and that upon application of said attorney, said restraining order was again made effective; that he took the deposition of the husband and also participated in the taking of the deposition of the wife; that he sought and procured an audit of the books of the hotel for the purposes of the divorce action; that he succeeded in ultimately obtaining a property settlement for defendant which was admittedly satisfactory to her and which, according to his testimony, was far more advantageous to her than the settlement that she had been willing to accept; that defendant was particularly anxious to obtain the hotel property in the settlement and was willing to obtain a loan thereon and to pay to the husband any sum not exceeding $200,000 for that purpose; that said attorney finally obtained an agreement whereby the husband relinquished all claim to the property claimed by defendant as her separate property, gave her all of the community property with exception of the stock above mentioned of the value of approximately $12,750 upon payment to the husband of the sum of $117,500; that in said agreement defendant waived all claim against the husband for counsel fees; that shortly after said agreement was signed by the parties, said attorney discussed with the defendant herein the amount of attorney's fees which he should receive; that he stated that his fees would be $20,000; that defendant thought that figure was high and upon being asked what she thought would be fair, she stated: "I think about $11,000 would be about right"; that said attorney then suggested that they make it $15,000 and she said, "That is all right, that is fine. * * * I will make it up to you in other ways and let you have some other business." Thereafter the property settlement was consummated through obtaining a loan upon the hotel and the interlocutory decree was subsequently obtained without contest.

The complaint in the present action was stated in two counts. The first count was one for the reasonable value of the services rendered, which was alleged to be $15,000, and the second count was one for the agreed amount of $15,000 which defendant was alleged to have promised to pay for said services. The prayer of the complaint was for said sum of $15,000 with interest.

[1, 2] In the first points raised by appellant it is claimed that the pleading and proof of the assignment to respondent was insufficient. These points may be considered together. There was admittedly a defect in the pleadings. No attack is made upon the first count, which was stated in three paragraphs. Paragraph I set forth the allegation that Vincent W. Hallinan was at all times a duly licensed attorney at law. Paragraph II contained the customary allegations of a count for the reasonable value of legal services. Paragraph III contained allegations which are conceded to be sufficient to cover the assignment of the claim from Vincent W. Hallinan to respondent. The second count is the one at which the attack is directed. In paragraph I thereof respondent incorporated by reference the allegations of paragraphs I and II of the first count. It was no doubt intended, as stated by respondent, to incorporate by reference paragraphs I and III rather than paragraphs I and II of said first count. In paragraph II of the second count, respondent set forth the customary allegations of a count for the agreed price for legal services performed. No further allegations were contained in said second count. It therefore appears that there was no allegation in said second count covering any assignment of the claim to respondent and for this reason said second count was insufficient to state a cause of action in favor of respondent. While all of the allegations of the complaint were denied in the answer, it appears that appellant in effect waived the issue concerning the assignment upon the trial. When the prospective jurors were being questioned, Mr. Barry, then counsel for appellant, asked for and received from Mr. Bourquin, counsel for respondent, the following stipulation: "Mr. Barry: Now will it be admitted, Gentlemen, that Mr. Hallinan is, in fact, the owner of the claim here that is sued upon, and that Miss Collins represents him in the trial of the suit?" "Mr. Bourquin: Surely." The court likewise assumed that the making of the assignment was an admitted fact when it stated to the prospective jurors: "Miss Collins, as has been explained to you, Ladies and Gentlemen, is the assignee of Mr. Vincent Hallinan. Mr. Hallinan has assigned or transferred or given over to Margaret Collins his right, title and interest in and to this cause of action. Do I state that correctly?" "Mr. Bourquin: That is correct, if Your Honor please." To this statement counsel for appellant made no reply and took no exception. In the testimony of Mr. Hallinan the following question was asked and the following answer was given: "Q. The plaintiff in this action, Margaret Collins, was the person to whom you assigned your claim against Mrs. Welsh for the services rendered her? A. For the purpose of filing this suit, yes."

We find no merit in the contention that the evidence was insufficient to prove the assignment. In support of said contention appellant cites Gustafson v. Stockton, etc., R. Co., 132 Cal. 619, 64 P. 995, Brown v. Curtis, 128 Cal. 193, 60 P. 773, and Gilmore v. Caswell, 65 Cal. App. 299, 224 P. 249, but none of these authorities is in point. The general rule is that an assignment must be proved by clear and positive evidence, the reason for the rule being that a defendant should be afforded protection to that extent from any further claim by the assignor. Brown v. Curtis, supra, page 196 of 128 Cal., 60 P. 773, 774. But here the testimony of the assignor himself was sufficiently clear and positive to prove the assignment and to protect the appellant from any further claim by said assignor. Furthermore, it is apparent that the existence of such an assignment was assumed by all as is shown by the stipulation entered into during the examination of the jurors. While such stipulation was made before the jury was finally selected and sworn, it was made during the trial of the cause and in our opinion appellant cannot now be heard to question the sufficiency of the evidence to prove the fact when appellant asked for and received a stipulation thereon during the trial.

Nor do we find any merit in the contention that the judgment based upon a general verdict must be reversed because of the above-mentioned insufficiency of the allegations of the second count of the complaint. Both counts were obviously drawn to cover a single claim for legal services. The first count contained sufficient allegations covering the assignment and appellant could not have been misled by the typographical error by which respondent failed to properly incorporate said allegations in the second count. Under the circumstances presented by the pleadings and the proof herein, this is clearly a case where a reversal should not be ordered merely because of said defect in the pleadings. Constitution, art. 6, § 4½; see, also, Baker v. Miller, 190 Cal. 263, 212 P. 11; Bonney v. Petty, 125 Cal. App. 527, 13 P.(2d) 969; Nichols v. Smith, 136 Cal. App. 272, 28 P.(2d) 693.

[3, 4] Appellant further contends that respondent is barred from recovering from appellant either upon an express or implied contract for services performed for her in the divorce action as Mr. Hallinan had obtained an allowance of counsel fees in the sum of $300 in that action, which sum had been paid by the husband and received by Mr. Hallinan. In our opinion this contention is likewise without merit. In support thereof appellant relies solely upon certain language found in the opinion in Theisen v. Keough, 115 Cal. App. 353, at pages 361 and 362, 1 P.(2d) 1015. The facts in that case were quite different from those before us and we believe the language employed in the opinion must be read in the light of the facts which were there under consideration. In that case the attorney was dismissed immediately after the award of counsel fees had been made and complied with. He performed no services whatever after the making of the order. The soundness of the decision in that case cannot be questioned, but neither the decision nor the language employed would lead to the conclusion that such an award would bar a recovery from the wife under all circumstances.

An award of counsel fees to the wife made at the inception of divorce proceedings is based largely upon the necessity for the same for the purpose of enabling the wife to proceed with the litigation. (Civ. Code, § 137; 1 Cal. Jur. 958 et seq.) The amount awarded is not in any sense a determination by the trial court of the reasonable value of all legal services to be rendered as the amount and nature of said services cannot then be ascertained. Supplemental allowances may be made (1 Cal. Jur. 1000, § 53), and frequently are made in practice. The trial courts no doubt make the original allowance more in the light of what appears to be the immediate necessity of the wife than in the light of the probable value of the services to be performed. If the necessity does not clearly appear, the trial courts may in their discretion deny any award for temporary alimony or counsel fees (1 Cal. Jur. 968), but it has been held that an award may properly be made even though the wife owns nonincome producing property (Farrar v. Farrar, 45 Cal. App. 584, 188 P. 289). In cases where the wife has some separate property, even though it be nonincome producing, the necessity may not be so great in the mind of the trial court and this fact may be taken into consideration in determining the amount required to meet the wife's immediate needs. It is thus apparent that the amount, if any, awarded by the trial court in a preliminary order for counsel fees does not necessarily bear any relation to the reasonable value of the legal services to be performed thereafter.

In the divorce action under consideration here, the wife had separate property of the value of $42,000. Whether this property was income producing or nonincome producing does not appear from the record herein. The wife also had an interest in community property, which community property had a value of approximately $500,000. She was awarded temporary alimony of $750 per month. Under these circumstances the trial court might have denied her any award for counsel fees in its discretion as it might well have concluded that the wife would have no difficulty in obtaining counsel to proceed with the litigation without any award of counsel fees from the husband. And the fact that the trial court in its discretion did award the sum of $300 as counsel fees did not in any manner fix the value of the services to be performed nor free the wife from her obligation, express or implied, for the services thereafter rendered.

[5, 6] Appellant also claims that the verdict was "unreasonable and arbitrary," but in our opinion this claim may not be sustained. In making this contention appellant ignores the testimony regarding an express agreement to pay the sum awarded, but owing to the conclusion we have reached, we may, for the purpose of discussing this contention, treat the case as one based solely upon an implied contract for the reasonable value of the services performed. The general rules for determining what constitutes a reasonable attorney's fee are well settled and are set forth in 3 California Jurisprudence, 698. It will be noted that two of the factors to be considered, among others, are the amount involved in the litigation and the success of the attorney's efforts. The evidence here showed that the amount involved was large and, although the evidence was somewhat conflicting, there was ample evidence to show that Mr. Hallinan's efforts were highly successful as well as highly satisfactory to appellant. We must assume in support of the judgment that the jury accepted the evidence most favorable to respondent and, if so, the award of $15,000 cannot be said to be unreasonable or arbitrary.

[7] Appellant also contends that the express agreement to pay $15,000 for the serv-

ices rendered "was presumptively fraudulent and Mr. Hallinan could not recover upon said contract, even if proven, but could only recover the reasonable value thereof." There are several answers to said contention, but it is sufficient to point out that it does not appear herein that recovery was had upon the express contract nor that respondent was awarded more than the reasonable value of the services performed.

[8] The final point raised by appellant involves an attack upon a formula instruction given by the trial court. Said attack is based solely upon the ground that said instruction failed to require that the jury find that the claim had been assigned to respondent. In view of the stipulation and uncontradicted evidence concerning said assignment, we find no prejudicial error in the giving of said instruction.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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2 Cal.App.2d 74

ALBERDA et ux. v. SMITH et al.

Civ. 5141.

District Court of Appeal, Third District, California.

Nov. 7, 1934.

Rehearing Denied Dec. 7, 1934.

Hearing Denied by Supreme Court Jan. 3, 1935.

1. Fraud ⚷64(1)

In action against broker for fraud in misrepresenting ranch acquired by plaintiffs through exchange negotiated by broker, evidence that broker's agent who to plaintiffs' knowledge had not seen ranch stated while taking plaintiffs to ranch that other ranches they passed had sold at from $9,000 to $10,000 and that they were not as good as ranch in question *held* insufficient for jury on issue whether ranch was represented to be worth $9,000.

2. Fraud ⚷11(2)

Where opportunity is present to ascertain truth and to ascertain real value, statements as to value given as mere matters of opinion are only opinions of value.

3. Fraud ⚷20

Buyer who personally visited and inspected property after representations as to values are made was presumed to rely on his own conclusions rather than on representations.

4. Fraud ⚷20

Where written agreement of exchange stated that land exchanged was subject to mortgage of stated amount, persons to whom land was exchanged could not be deceived by alleged oral statement that mortgage was for lesser sum.

5. Fraud ⚷64(1)

In action against broker for fraud in misrepresenting ranch acquired by plaintiffs through exchange negotiated by broker, evidence that plaintiffs were misled by alleged representations of broker and his agent that ranch was free from incumbrances except mortgage for stated amount and that taxes did not exceed $65 per year and that there was good artesian well on ranch *held* insufficient for jury.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by N. Alberda and wife against Alfred Pinkney Smith and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

C. H. McCray, of Merced, and Joseph Barcroft, of Madera, for appellants.

Sherwood Green, of Madera, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiffs were the owners of the furniture and furnishings of a hotel in Madera. Defendant Crim was a real estate broker in Chowchilla. Smith was a salesman employed by him, and the Union Indemnity Company, a corporation, furnished the surety bond for Crim, as required by law.

Through defendants Crim and Smith an exchange was effected whereby the furnishings of the hotel were exchanged for a forty-acre tract of farm land near Chowchilla. The agreement, necessary for a better understanding of the issues, is in the following language:

"Agreement to Exchange Real Property.

"It is agreed that I, C. R. Heinmiller, of Chowchilla, California, owner of the following described property situated in the County of Madera, State of California, to-wit: Lots 557 and 558, in Block 38, Subdivision No. 2, of the Chowchilla Ranch, in Madera County, California, consisting of 40 acres of land, more or less, subject to a loan held by the Pacific Coast Joint Stock Land Bank of $3,557.21, and taxes not to exceed $350.00 otherwise clear and a $745.00 to be paid on pumping plant secured by apricot crop, and the following described personal property now on said premises, to-wit:

"Seven cows and one wagon, with an indebtedness of $300.00, payable $17.00 per month including interest, which I desire to exchange for property owned by N. Alberda, of Merced, which I have examined, situated in Merced, described as follows, to-wit: All furnishings of every kind and description now in building known as Central Hotel, in Merced, County of Merced, State of California, as per list attached hereto, free and clear of encumbrances, together with option to lease and letter of acceptance from owner of hotel above described, or his agent, Two Hundred and no/100 Dollars in cash or its equivalent, at time of consummating exchange.

"Terms of Exchange: Exchange to be consummated not later than five days from this date.

"I hereby appoint C. F. Crim and A. P. Smith my agents to act for me and agree to pay them for their services $250.00 as soon as exchange is completed and I herein agree that said agents shall collect a commission from the owner of the second property above described.

"Dated this 28th. day of April, 1932

"C. R. Heinmiller."

On the back of the agreement appeared the following acceptance:

"Acceptance. This agreement, Witnesseth: That I, N. Alberda of Merced, owner of the property secondly herein described, hereby accept the said proposition of exchange for the first piece of property which I have examined and of which I approve, upon the terms herein stated, and agree to furnish title to said property within five days, showing title in myself and then to deliver said property to C. R. Heinmiller or his assigns. And I further agree to pay C. F. Crim and A. P. Smith Two Hundred Fifty and 00/100 Dollars commission for said exchange. And I herein agree that said agents shall collect commission from owner of first piece of property.

"Dated at Chowchilla, this 28th. day of April, 1932.

"N. Alberda."

Plaintiffs, considering themselves deceived and defrauded, brought this action. At the trial they established the value of the personal property which they exchanged for the real property and introduced certain statements of defendants which they allege were false and fraudulent and then offered to prove the value of the real property involved. This latter evidence the court refused to admit, whereupon plaintiffs rested. A motion for an instructed verdict was made and granted, and the jury thereupon returned a verdict in favor of defendants. From that judgment, plaintiffs now prosecute this appeal.

Appellants set forth in their complaint, and offered evidence thereon, seven representations which they allege were false and untrue, which we will enumerate and discuss in order.

First. Defendants represented that the forty-acre tract of real property was worth $9,000.

In answer to this objection it appears from the testimony of Mr. Alberda, the plaintiff in the action, that neither Mr. Crim nor Mr. Smith stated to him the value of the real property.

"Q. Did he (Mr. Smith) ever tell you what the place was worth? A. No, he did not tell me what the place was worth. * * *

"The Court: Q. Did you ever ask them (Crim and Smith) how much the place was worth? * * * A. No sir.

"Q. And he never told you? A. No."

Appellants claim that while en route to the ranch defendant Smith pointed out certain ranches and said "that ranch sold for $9,000.00—this ranch sold for $10,000.00," and other similar statements coupled with the words, "And I do not think this is as good as the Heinmiller place."

Asked of Mr. Alberda:

"Q. But they did not say the particular place you bought was worth $9,000.00, just the others? That is all they said about value? A. They showed us different places and said, 'that one just sold for $10,000.00,' and 'there is a place I do not know what it brought, there is a millionaire living there,' and he explained not half so good as the place they were going to show us.

"Q. And that is the way they told you the place was worth $9,000.00? A. Yes sir.

"Q. And that is the only way they told you that? A. Yes sir.

"Q. Did Mr. Smith ever make any representation to you about the value of the property outside of what he showed you—and other places around there? A. No, but I took my judgment when he told me about the other place."

In regard to the character of the soil upon the land itself, Mr. Smith testified: "We went out to Mr. Heinmiller's, to this Mr. Heinmiller ranch, and we drove in and got out—Mrs. Alberda says, 'Is there any alkali in that ranch, anything like that, on this ranch,' and I says, I don't know, I have never been over it, let's go down and see. * * *" It also appears from the testimony of the witness that Mr. Smith, the salesman, was not familiar with the location of the ranch and had to inquire along the way as to the location thereof. It also appears from the testimony of Mrs. Alberda that when they arrived at the ranch Mr. Smith remarked to her that the place was in a run-down condition.

"Q. Did he tell you that was a run-down place? A. Yes, sir.

"Q. That is the way he talked about the place he was trading? A. Yes, sir.

"Q. He never did point to the piece of land that you bought from him and say it was worth so much money, did he? A. The Heinmiller place?

"Q. Yes. A. No."

[1-3] At most, the testimony reveals that the agents while en route to the ranch in question made certain statements as to the value of the ranches that were passed and compared these ranches with the Heinmiller property. At that time it was known to appellants that Smith, who made these statements, had never seen the Heinmiller ranch. It is the general rule that statements as to value, where they are given as mere matters of opinion and where the opportunity is present to ascertain the truth thereof and to ascertain the real value, are matters of opinion only. Craig v. Wade, 159 Cal. 172, 112 P. 891; 12 Cal. Jur., p. 729.

It appears from the acceptance that appellants examined the property personally, and generally if a buyer, after representations as to values are made, personally visits and inspects the property, he is then presumed to rely upon his own conclusions rather than upon the representations of the agent. Miller v. Ferguson, 55 Cal. App. 502, 203 P. 772.

[4, 5] Second. Defendants represented that Lewis A. Shirley was a searcher of titles and performed the work and services customarily performed by abstract companies.

There is no proof in the record that Lewis A. Shirley was not a searcher of records, but if the same were untrue, there is no proof of any damage sustained by any such misrepresentations, nor is the materiality of such fact apparent.

Third. Defendants represented that there was a mortgage due the Pacific Coast Joint Stock Land Bank in the sum of $3,450, whereas the fact is the mortgage was more than that sum.

In the written agreement of exchange between the parties, introduced in evidence, it appears that the land in question was "subject to a loan held by the Pacific Coast Joint Stock Land Bank of $3,557.21." The written agreement would, of course, represent the understanding by the parties, which appears to be in the correct amount.

Fourth. Defendants represented the property was free and clear of all incumbrances except a mortgage, when in fact said property was subject to the following matters of record: (a) Was within the boundaries of the Madera irrigation district; (b) was subject to a right of way for electric transmission line and for county roads; and (c) was subject to the obligations of reclamation district 1664.

In regard to the question the right of way for transmission lines and county roads, Mr. Alberda testified, in answer to the following question: "Mr. Smith told you there was a right of way for the power lines, and about the easement for roads on two sides of the place? A. Yes, sir." In regard to the property being within the boundaries of the Madera irrigation district, the following question was asked of Mr. Alberda: "Q. They told you about the Madera Irrigation District? A. I do not remember whether they did or not." As to whether the defendants failed to disclose that the property was within the reclamation district, the following appears: "Q. Was anything said at that time before the time the deal was closed about a reclamation district? A. I do not remember."

Fifth. That all of the taxes did not exceed $65 per year.

In regard to the foregoing representation, the written agreement heretofore referred to contains the following: "Subject to a loan, * * * and taxes not to exceed $350.00." It was stipulated that the taxes chargeable against the property at the time was $291.93. Plaintiffs claim that defendants misrepresented the number of payments due to the Pacific Coast Joint Stock Land Bank, as well as the amount then due. We have already seen that the written agreement correctly sets forth the total amount due the Land Bank, and there is no evidence in the record as to the number of installments unpaid at the time the transaction was made.

Sixth. That there was a good artesian well on the property.

As to an artesian well, Mr. Alberda was asked:

"Q. Did you ever see an artesian well? A. No sir.

"Q. Do you know what one is? A. I could get no idea of it. * * *

"Q. When you got ready to make the deal you didn't make it because you thought you were getting a place with an artesian well, did you? A. I could not tell you; I never gave it a thought."

Seventh. That the equity in said real property was worth $5,000.

An examination of the record does not show that such representation was made. At most, it appears that the parties were exchanging certain furnishings for a particular ranch, no values were fixed, and apparently no representation as to values made.

We are forced to the conclusion, therefore, that the evidence offered in support of the various allegations of misrepresentation do not sustain the contentions of appellants, and the court was correct in directing a verdict in favor of respondents. The judgment based thereon should, therefore, be affirmed, and it is so ordered.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

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2 Cal.App.2d 48

UNION TITLE INS. CO. v. MAYTAG CO. et al.

Civ. 1146.

District Court of Appeal, Fourth District, California.

Nov. 5, 1934.

Hearing Denied by Supreme Court Jan. 4, 1935.

1. Appeal and error 🔑878(2)

Parties upholding judgment on appeal, and who had taken no appeal from any part of it, may not attack court's findings.

2. Mortgages 🔑292(6)

Evidence that grantee knew of mortgage not satisfied of record but made no effort to discover from mortgagee status of mortgage, though it was sufficiently curious to inquire whether mortgagor had made any agreement or obtained extension of time from mortgagee, *held* insufficient to sustain finding that grantee did not accept conveyance subject to mortgage (Code Civ. Proc. § 337).

3. Limitation of actions 🔑143(6)

Where mortgagor acknowledged debt before it was barred by limitation and later conveyed to grantee having actual and constructive knowledge of mortgage and that it was not satisfied of record, but who made no inquiry of mortgagee to ascertain status of mortgage, grantee cannot successfully claim that debt and mortgage are barred as to him (Code Civ. Proc. § 337).

4. Limitation of actions 🔑143(6)

That mortgaged property was community property and wife had not authorized husband to acknowledge debt before it was barred by limitation would not enable purchaser making no inquiry to take mortgaged premises free from mortgage lien, since, even if wife joined with husband in deed to purchaser, only interest she could convey was interest which she owned which was expectancy in property (Code Civ. Proc. § 337).

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by the Union Title Insurance Company against the Maytag Company and others, in which named defendant filed a cross-complaint against defendants Bay Trust Company and others. From those portions of the judgment rendered in favor of cross-defendant Bay Trust Company, cross-complainant Maytag Company appeals.

Reversed.

Gray, Cary, Ames & Driscoll, of San Diego, for appellant.

D. C. Collier and Hillyer & Boldman, all of San Diego, for respondents.

JENNINGS, Justice.

This action was instituted by the plaintiff to enforce payment of the balance claimed to be due from Carl H. Heilbron and Katherine Matilda Heilbron, his wife, the makers of a certain promissory note, and to foreclose the mortgage on real property which was given to secure payment of the note. The Maytag Company, a corporation, owner and holder of a second mortgage on the same property, was joined as a party defendant with the makers of the note. The Bay Trust Company, a corporation, grantee of the real property mentioned in both mortgages, in a deed which was executed by the Heilbrons subsequent to the execution of both mortgages, was likewise joined as a party defendant in the action. The defendant Carl H. Heilbron defaulted in appearance and his default was duly entered. On October 27, 1932, the Maytag Company filed an answer in which it denied, for lack of information, certain allegations of the complaint and a cross-complaint in which the Heilbrons and the Bay Trust Company were named as cross-defendants, wherein it alleged the execution by the Heilbrons of a promissory note in its favor for $10,000 on September 1, 1925, payable two years after date and the execution by the same persons on the same date of a mortgage on the same property described in plaintiff's complaint to secure payment of said note; that on and after October 9, 1929, the cross-defendants Carl H. Heilbron and Katherine Matilda Heilbron, by written instruments delivered to the cross-complainant, had acknowledged the indebtedness represented by the note and promised and agreed to pay the same; that default had been made in the payment of the principal of said note and in the payment of interest thereon after October 1, 1926. The cross-complaint concluded with a prayer for a personal judgment on the note against the Heilbrons and that such judgment be declared a lien inferior to plaintiff's lien but prior and superior to the rights, titles, and interests of the cross-defendants. To this cross-complaint the cross-defendants Katherine Matilda Heilbron and the Bay Trust Company filed a joint answer in which these parties alleged that as to them the cause of action set forth in the cross-complaint was barred by the provisions of section 337 of the Code of Civil Procedure. They further denied that they or either of them had, at any time, by any written instrument, acknowledged the indebtedness described in the cross-complaint or that either of them had promised or agreed to pay the same. The cross-defendant Carl H. Heilbron entered no appearance to the cross-complaint and his default in this respect was noted.

When the action was called for trial, it was stipulated in open court by counsel representing the Maytag Company, cross-complainant, and by those representing the cross-defendants Bay Trust Company and Katherine Matilda Heilbron that the plaintiff should have judgment in accordance with the prayer of its complaint. The trial then proceeded on the issues raised by the cross-complaint and the answer filed thereto by the cross-defendants. Upon the conclusion of the trial the court rendered judgment in plaintiff's favor against Carl H. Heilbron and Katherine Matilda Heilbron for the balance found due on the promissory note executed by these parties and foreclosing plaintiff's mortgage on the real property. A personal judgment against the Heilbrons was likewise rendered in favor of the cross-complainant for the amount found to be due on the promissory note executed by these parties to the cross-complainant on September 1, 1925. The mortgage on the real property which was executed by Carl H. Heilbron and Katherine Matilda Heilbron to secure payment of this note was, however, declared to be inferior to the interest of the cross-defendant Bay Trust Company in the real property, and it was adjudged that the property be sold and if at such sale an amount in excess of that required to satisfy plaintiff's demand should be realized such excess should be paid to the Bay Trust Company. From those portions of the judgment rendered in favor of the cross-defendant, Bay Trust Company, the cross-complainant Maytag Company has prosecuted this appeal.

On this appeal two principal contentions are advanced by appellant. The first of these is that the trial court's finding that in acknowledging the indebtedness represented by the promissory note executed on September 1, 1925, by certain letters addressed to appellant on October 9, 1929, the cross-defendant Carl H. Heilbron merely purported to act as the agent of his wife, respondent Katherine Matilda Heilbron, is not supported by the evidence adduced during the trial. It is appellant's contention that the undisputed evidence indicated that Carl H. Heilbron was in fact authorized to act as his wife's agent in acknowledging the indebtedness and that the court should have so found. The second contention of appellant is that the court's finding that at the time the property incumbered by appellant's mortgage was conveyed to the respondent Bay Trust Company, the grantee did not take the property subject to appellant's mortgage, is likewise lacking in evidentiary support.

An intelligent consideration of the above-mentioned contentions requires a recital of the evidentiary facts which are in no wise disputed. On September 1, 1925, Carl H. Heilbron and his wife were the record owners of certain real property in San Diego county. This property was community property but was not their home and no declaration of homestead had been filed upon it. On the above-mentioned date the two Heilbrons joined in the execution of a promissory note by which they agreed to pay to appellant the sum of $10,000 two years after the date of the note. Coincident with the execution of this note the makers thereof executed a mortgage on the above-mentioned real property to secure payment of the note. The note bore interest at the rate of 7 per cent. per annum. The interest due thereon appears to have been paid by Carl H. Heilbron for a time but by October, 1929, it was considerably in arrears. On October 3, 1929, E. L. Nelson, the assistant secretary of appellant, addressed a letter to Carl H. Heilbron, in which reference was made to certain correspondence which had passed between Nelson and Heilbron in the month of April, 1928, relative to releasing acreages from time to time as such acreages might be sold by Heilbron "from the Ramona Ranch on which we hold a second mortgage of $10,000.00." The letter concluded with a request that Heilbron should advise the Maytag Company fully as to his plan for meeting his obligation to the company and inform the company of the status of the ranch at that time, what loans, if any other than that due the company, had been made on the security of the ranch property, whether the taxes assessed against the ranch had been paid, etc. In response to this letter, Carl H. Heilbron, on October 9, 1929, wrote two letters. One of these was addressed to E. L. Nelson, assistant secretary of the Maytag Company, and the other to Fred Maytag. The letter to Nelson stated that a proposed sale of four acres from the Ramona ranch "on which your Company holds a second mortgage of $10,000.00" had not been consummated. The letter further stated that the balance due on the first mortgage on the property had been reduced to less than a thousand dollars, that the state and county taxes had been paid, and that the property was in better shape than when the second mortgage was executed. The letter contained an admission that the writer had not been financially able to make any payments of interest or principal on the second mortgage and that he did not anticipate being able to do so for some months in the future but that he was making every effort to get himself and his affairs in shape "so this matter may be cleared up at the earliest possible moment." The letter concluded with a statement that the writer had evolved a plan for developing the property as a club resort which he believed would enable him "to clear your mortgage up" and that he would describe the plan in detail in a letter which he would shortly address to Mr. Fred Maytag. The letter to Fred Maytag referred to the communication which the writer had received from E. L. Nelson "asking for information in regard to the second mortgage on the ranch and the present condition of the property." The communication contained a suggestion of a wish that the Maytag Company might see fit to "write this matter off their books as a loss against their government income tax, or in some other manner if possible, to let the matter remain as a personal matter between yourself and the writer: I agreeing to do everything possible to clear the matter up at the earliest possible moment." A somewhat detailed outline of the writer's plan to develop the property as a club resort was then presented, together with the expression of a hope that it might appeal to Maytag and that the writer would have his cooperation "in putting it over." During the month of October, 1930, communications passed between E. L. Nelson of the Maytag Company and Carl H. Heilbron relative to the latter's indebtedness to the company and to Heilbron's proposal to develop the Ramona property as a club resort. Heilbron's letter of October 13, 1930, addressed to Nelson, referred to his "recent inquiry relative to my note to your Company," stating that conditions had been such that he had been unable to do anything with the club project but that he had kept up his payments on the first mortgage, the amount of which had then been reduced to $746.92, that he was still making monthly payments on the first mortgage and that the taxes had been paid in full to date. The letter concluded with a statement that he was making plans to revive the club resort project. On February 11, 1931, Carl H. Heilbron conveyed the property described in appellant's mortgage to the Bay Trust Company. D. C. Collier, who was called as a witness for respondents, testified that he "took the conveyance in the name of the Bay Trust Company." On March 7, 1932, E. L. Nelson addressed a letter to Carl H. Heilbron, making inquiry as to the status of the first mortgage against the Ramona property and concluding with a request for a statement from Heilbron "as to how matters stand at the present time and what we may expect on the note we are holding." To this letter Heilbron replied on March 14, 1932, stating that on February 11, 1931, he "had signed over to Col. D. C. Collier any equity that might remain in the property on which your company was kind enough to make me a loan" and suggesting that Nelson communicate with Col. Collier in regard to the present status of the property. The letter concluded with an expression of regret that the writer had been unable "to make any further payments on my note at this time and assure you that

I do not in any sense repudiate this obligation and hope that my condition will be such, some time in the future that I may be able to clear the entire amount up."

The trial court found "that at various times between August 18, 1927, and March 19, 1932, and particularly on October 9, 1929, said cross-defendant Carl H. Heilbron, by instruments in writing (copies of which instruments in writing are set out in Finding Number X) delivered to cross-complainant the Maytag Company, a corporation, acknowledged the indebtedness above described." Finding number X contains copies of the two letters written by Carl H. Heilbron on October 9, 1929, and of the letter written by Heilbron on March 14, 1932, to which reference has heretofore been made. The court next found "that cross-defendant Carl H. Heilbron, in acknowledging the indebtedness above described by said instruments in writing delivered to cross-complainant, the Maytag Company, a corporation, acted not only personally in his own behalf, but purported to act as the agent of cross-defendant Katherine Matilda Heilbron, who duly and properly ratified his actions in so acknowledging the indebtedness, which ratification was made at the time of trial, to-wit, March 20, 1933, and in the manner set out in Finding Number XII."

It must be observed that the court in these findings did not definitely and with certainty find that Carl H. Heilbron acknowledged the indebtedness to appellant by his letters of October 9, 1929. We think, however, that this is reasonably and fairly implied from its findings, especially from the finding which refers particularly to the letters of the above-mentioned date.

Appellant does not attack the court's finding that Carl H. Heilbron acknowledged the indebtedness, but does complain that the finding that Heilbron merely purported to act as his wife's agent in acknowledging the indebtedness and that his action in this regard was not authorized by the wife at the time it was accomplished but was ratified by her at the time of trial is not in accord with the undisputed testimony of the wife as given by her when she was called as a witness during the trial of the action.

[1] Respondents, on the other hand, complain of the court's finding that Carl H. Heilbron acknowledged the indebtedness and contend that the letters of Carl H. Heilbron to appellant under date of October 9, 1929, and March 14, 1932, did not contain such a distinct, unqualified, and unconditional promise to pay the existing indebtedness as to toll the statute of limitations. We think that we are not, on this appeal, warranted in giving consideration to this contention. Respondents are here upholding the judgment and have taken no appeal from any part of it. Since these parties have taken no appeal, they may not attack the court's findings upon which, in the final analysis, the judgment which they maintain is correct is based. Klauber v. San Diego Street Car Co., 98 Cal. 105, 32 P. 876; Trevaskis v. Peard, 111 Cal. 599, 44 P. 246; Hollywood Cleaning & P. Co. v. Hollywood L. Service, 217 Cal. 131, 137, 17 P.(2d) 712; Todd v. Temple Hospital Ass'n, Inc., 96 Cal. App. 42, 48, 273 P. 595; Kane v. Eastman, 110 Cal. App. 753, 759, 295 P. 63.

[2] For the purposes of this opinion and without here deciding its correctness or incorrectness, we shall assume that appellant's attack upon the above-mentioned findings is not sustainable. This assumption brings us to a consideration of appellant's second contention which is that the trial court's finding that the Bay Trust Company did not, on February 11, 1931, accept a conveyance of the property subject to the mortgage of appellant and that the judgment which adjudged that the lien of appellant's mortgage is inferior to the interest of the Bay Trust Company is incorrect.

Closer analysis of the findings and legal conclusions and of the judgment demonstrates that the trial court arrived at the following result: Carl H. Heilbron acknowledged the indebtedness to appellant by his letters of October 9, 1929, which were written at a time when the debt was not barred by the statute of limitations. He thereby tolled the statute as to himself. He purported to act as his wife's agent in acknowledging the indebtedness but was not authorized so to act by her. Consequently the debt became barred as to her on September 1, 1931. At the time of trial, however, she ratified his action of October 9, 1929, in acknowledging the indebtedness and thereby waived her personal privilege of insisting upon the bar of the statute so that the cause of action on the note which she signed jointly with her husband revived as to her and appellant was entitled to a personal judgment against her jointly with her husband. Although Carl H. Heilbron had tolled the statute on October 9, 1929, and thus commenced the running of a new period of four years within which the cause of action on the original promise would not be barred by the statute, nevertheless when he conveyed the property to the Bay Trust Company on February 11, 1931, this grantee did not accept the conveyance subject to appellant's mortgage and respondent Bay Trust Company acquired an interest in the property which was superior to appellant's mortgage. This conclusion is proper if the evidence produced during the trial of the action sustains the court's finding that although respondent Bay Trust Company had knowledge, both actual and constructive, of the existence, as an incumbrance against the property, of appellant's mortgage, nevertheless at the time of the conveyance of the property to said respondent this grantee did not accept the conveyance subject to the lien of appellant's mortgage.

The only evidence which was produced during the trial which bore upon the knowledge of the respondent Bay Trust Company of the existence of appellant's mortgage and of the lack of knowledge of the grantee that its grantor had tolled the running of the statute of limitations consists of the testimony of the witness D. C. Collier. This evidence showed: First, that the witness who was president of the Bay Trust Company had knowledge of the existence of appellant's mortgage when he accepted the deed to the property from Carl H. Heilbron; second, that it never occurred to him that Heilbron might have tolled the statute of limitations and he did not therefore request Heilbron to permit him to see any letters which Heilbron had written to appellant; third, that his curiosity was nevertheless aroused as to why appellant had permitted the debt to run for four or five years without any payment having been made on it so that he inquired of Heilbron whether he had made any agreement or obtained any extension of time from appellant and received a negative answer to his inquiry; fourth, that he knew the obligation was not satisfied of record but did not address any inquiry to appellant to ascertain the status of the mortgage.

We think that this evidence is not sufficient to sustain the trial court's finding that respondent Bay Trust Company did not accept conveyance of the property subject to appellant's mortgage. The witness who was president of the grantee corporation and who testified that he took the conveyance "in the name of the Bay Trust Company" admitted that he knew of the existence of the mortgage and that it was not satisfied of record but that he made no effort to discover from appellant the status of its mortgage although he was sufficiently curious, in spite of the fact that it did not occur to him that Heilbron might have tolled the statute of limitations, to inquire of Heilbron whether "he had made any agreement or obtained any extension of time from them." "Under a similar state of facts it was said of such a purchaser: 'He further knew, as matter of law, that under the statute of limitations a renewal of the note was a possible event. He might, and as a prudent man he ought, before concluding his purchase, to have sought out Lent (the plaintiff), and inquired of him as to whether the note had been renewed in fact. If, on such application, Lent (the plaintiff) had told him that there had been no renewal, and if thereupon Chambers (the appellant), on the faith of the statement, had closed the trade, and paid his money for the land, Lent (the plaintiff) would have been estopped from setting up the mortgage against the man whom his own false suggestions had misled. Not having pursued that course, however, Chambers (the appellant) must be understood to have bought and taken his conveyance subject to all hazards.' Lent v. Morrill, 25 Cal. 492." Newhall v. Hatch, 134 Cal. 269, 275, 66 P. 266, 268, 55 L. R. A. 673. To the same effect are the decisions in Craig v. Dinwiddie, 77 Cal. App. 681, 247 P. 516, and Wood v. Willey, 136 Cal. App. 197, 28 P.(2d) 367.

[3, 4] It must be obvious that, if Carl H. Heilbron acknowledged the debt prior to the time it was barred by the statute of limitations and later conveyed the mortgaged property to a purchaser who accepted the conveyance with both actual and constructive knowledge of the existence of the mortgage and that it was not satisfied of record and who nevertheless made no inquiry of the mortgagee to ascertain whether Heilbron had taken any action to toll the statute, the purchaser may not successfully claim that the debt and its incident, the mortgage, are barred as to him. Nor does the undisputed fact that the mortgaged property was community property of Carl H. Heilbron and Katherine Matilda Heilbron and the latter had not authorized her husband to acknowledge the debt for her have the effect of enabling the purchaser to take the mortgaged premises free from the mortgage lien. The record herein fails to show that respondent Katherine Matilda Heilbron joined with her husband in the execution of the deed, whereby the property was conveyed to respondent Bay Trust Company. However, if it be assumed that she did so join, the only interest which she could convey to the Bay Trust Company was the interest which she owned which has been uniformly defined to be an expectancy in the property. Certainly her conveyance of such an interest could not work

the curious and inequitable result that appellant's mortgage lien would be entirely eradicated and the purchaser who accepted the conveyance without making any inquiry of the mortgagee would be entitled to have its title to the land quieted against the lien of the mortgage which was given to secure the payment of an admittedly outstanding indebtedness. Yet this is exactly the result which has been achieved by the judgment herein. It necessarily follows that a proper application of the legal principles which are pertinent to the situation disclosed by the record demands a reversal of the judgment.

Those portions of the judgment from which this appeal has been taken are therefore reversed.

We concur: BARNARD, P. J.; MARKS, J.

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2 Cal.App.2d 197

HAMMOND LUMBER CO. v. DANZIGER et al.

Civ. 8037.

District Court of Appeal, Second District, Division 1, California.

Nov. 13, 1934.

1. Husband and wife 🔑158

Wife who executed guaranty jointly and severally with husband *held* liable as guarantor to same extent as though she was stranger to other guarantor, since married woman may contract as freely as though she were unmarried, and her separate estate is liable for performance of her contract (Civ. Code, §§ 158, 171).

2. Husband and wife 🔑158

Words "wife's signature" appearing above signature of wife on guaranty signed also by husband *held* not to invalidate guaranty, since wife's liability under guaranty was individual (Civ. Code, §§ 158, 171).

3. Evidence 🔑448

In action upon guaranty executed jointly and severally by husband and wife, wife's testimony showing what her understanding was as to her liability when she signed guaranty *held* properly excluded where no fraud was claimed and terms of guaranty were clear (Civ. Code, §§ 158, 171).

4. Evidence 🔑413

Alleged conversation between husband and wife at time they signed guaranty or other circumstance then occurring *held* not binding upon guarantee, where no officer or agent of guarantee was present at time wife signed guaranty, and erroneous belief or interpretation of legal effect of document was immaterial as to wife's liability (Civ. Code, §§ 158, 171).

5. Evidence 🔑427

In action upon guaranty jointly and severally executed by husband and wife, guarantee's credit man *held* properly permitted to testify as to conversation he had with husband, not in presence of wife, in which credit man informed husband that guarantee would not furnish materials without written guaranty signed by both husband and wife, where conversation had no bearing upon circumstances attending signing of guaranty by wife (Civ. Code, §§ 158, 171).

6. Guaranty 🔑16(1)

Wife who jointly and severally with husband signed guaranty could not claim lack of consideration because guaranty was to secure materials furnished to corporation in which husband held stock, where guaranty was delivered as part of transaction whereby guarantee agreed and did deliver materials (Civ. Code, §§ 158, 171, 2792).

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Hammond Lumber Company against J. M. Danziger and Edith Wake Danziger. From a judgment for plaintiff, second named defendant appeals.

Affirmed.

Charles C. Montgomery, of Los Angeles, for appellant.

Holbrook, Taylor, Tarr & Horton, of Los Angeles, for respondent.

HAHN, Justice pro tem.

Defendant Edith Wake Danziger appeals from a judgment rendered in favor of plaintiff and against defendants for the sum found due, in an action upon a contract of guaranty which reads as follows:

"Los Angeles, California,
"Date Feb. 9, 1925.

"For Value Received, the undersigned, jointly and severally, hereby guarantee due payment of any amounts owing or to be owing in the future to the Hammond Lumber Company by Olympic Auditorium, Inc. (on job 18th & Grand Ave.), and hereby agree that this guarantee may and shall be deemed and considered the obligation of the undersigned as an original debtor on any such account, and that in the event of any liability accruing under this guarantee, said Hammond Lumber Company shall not be required to first exhaust whatever remedies they have against the above-named debtor, and that the undersigned may be proceeded against in the nature of original and principal debtor thereon, jointly and severally, or jointly or severally with said above-named debtor. It is further agreed that this guarantee shall include interest at the legal rate of seven per cent (7%) from the due date of the account.

"Signature [Signed] J. M. Danziger
"Wife's Signature
"[Signed] Edith Wake Danziger"

It appears that the defendant J. M. Danziger, as a stockholder of the corporation engaged in building the Olympic Auditorium in Los Angeles, was interested in having plaintiff company furnish certain building materials for the construction. Before consenting to do so, Edward Innis, plaintiff's credit man, informed defendant J. M. Danziger that the company would not furnish the desired material unless a written guaranty to pay for the materials, signed by him and his wife, was given to the company. To this demand Danziger agreed, and, at his request, the desired agreement was prepared and forwarded to him on or about February 9, 1925, for execution by him and appellant, his wife.

On February 18th the guaranty bearing the signatures of both defendants was received by plaintiff. After Danziger's promise to furnish the guaranty, but before it was received by it, plaintiff, relying upon Danziger's promise, delivered building materials of the value of $885. After receiving the signed guaranty, plaintiff delivered building materials of the value of $61,528.99. Payment of $5,584.65 was made on account, leaving a balance owing to the plaintiff without interest of $56,829.30. To recover this amount with interest, this action was brought on the contract of guaranty.

Appellant urges a reversal of the judgment on the following grounds: (1) That her separate property should not be held liable under a contract of guaranty signed by her as a wife, to secure the payment of corporate indebtedness in which corporation she had no interest except indirectly a community interest in stock owned by her husband; (2) that the testimony of the wife should have been limited as to her understanding in signing the guaranty on a line following the words "Wife's Signature"; (3) that the testimony as to conversations had with a husband not in the presence of the wife should have been excluded as hearsay; (4) that a guaranty signed by a wife is without consideration as to her, and is not binding when shown not to be the basis for delivery of the goods, or on a contract existing at the time.

[1] Appellant, having executed the contract of guaranty jointly and severally with her husband, is liable to the same extent as though she was a stranger to the other guarantor. Under the laws of California, a married woman may contract as freely as though she were unmarried, and her separate estate is liable for the fulfillment of her contracts. Sections 158 and 171, Civ. Code; Alexander v. Bouton, 55 Cal. 15.

[2] The words "wife's signature" which appear just above the signature of appellant on the contract of guaranty are of no significance so far as the legal effect of the document is concerned. Whether designated as "his wife" or not, appellant's liability under the contract is individual. McClintick v. Frame, 98 Cal. App. 338, 276 P. 1033.

[3, 4] The court did not err in excluding the testimony of appellant offered for the purpose of showing what her understanding was as to her liability when she signed the contract. It was stipulated by her counsel that no fraud was claimed in securing her signature to the guaranty. The terms of the document are clear and unambiguous. Hence no oral testimony is necessary or competent to aid in determining its meaning or purpose. Furthermore, as no officer or agent of plaintiff was present at the time of the signing of the document by appellant, any conversation at that time between appellant and her husband, or any other circumstance then occurring, would not be binding upon plaintiff. Any erroneous belief or interpretation of the legal effect of the document, in no way induced by plaintiff's officers or agents, would be incompetent and immaterial on the issue here involved. Stafford v. Hill, 53 Cal. App. 337, 200 P. 33.

[5] Nor is there merit in appellant's next point that the court erred in permitting witness Edward Innis, credit man for plaintiff, to testify as to a conversation he had with defendant J. M. Danziger, not in the presence of appellant, in which he informed Danziger that plaintiff company would not furnish the materials as requested without the written contract of guaranty signed by both him and

his wife. This conversation was a part of the transaction wherein plaintiff agreed to and did furnish the materials. It had no bearing upon the manner or circumstances attending the execution of the contract by appellant. It went to the point of showing the detriment suffered by plaintiff in consideration of the execution of the guaranty.

[6] Appellant's last point, that there was no consideration moving to appellant for her execution of the guaranty, and therefore the contract is not binding upon her, cannot be sustained. The court found, upon abundant evidence, that the guaranty was executed and delivered as a part of the transaction whereby plaintiff agreed to and did sell and deliver the building materials. This under our Code (section 2792, Civ. Code) is all the consideration necessary to bind the guarantors. Stafford v. Hill, supra; Howland v. Aitch, 38 Cal. 133; Citizens' Trust & Savings Bank v. Bryant, 53 Cal. App. 735, 200 P. 823; Drovers' Nat. Bank v. Browne, 88 Cal. App. 716, 264 P. 265. The detriment to plaintiff in delivering the material is ample consideration for the guaranty. Westphal v. Nevills, 92 Cal. 545, 28 P. 678.

For the reasons indicated, the judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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2 Cal.App.2d 96

CRANDALL v. TITLE GUARANTEE & TRUST CO. et al.

TITLE INS. & TRUST CO. et al. v. CRANDALL.

Civ. 1539.

District Court of Appeal, Fourth District, California.

Nov. 7, 1934.

Hearing Denied by Supreme Court Jan. 3, 1935.

Mortgages 🔑356

Where deed of trust covered two separate parcels of real estate situated in different cities, notice of sale published in newspaper in only one city *held* sufficient under statute providing that, before sale of property under power contained in deed of trust, notice must be given in newspaper published in city in which property or some part thereof was situated, since words "some part thereof" referred to entire property sold and not to each parcel of property (Code Civ. Proc. § 692, subd. 3).

[Ed. Note.—For other definitions of "Some Part," see Words & Phrases.]

◆

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Bruce V. Crandall against the Title Guarantee & Trust Company and others, in which the Title Insurance & Trust Company and the Mortgage Guarantee Company filed cross-complaints. From the judgment, the plaintiff appeals.

Affirmed.

R. C. Mize, of Santa Ana, and Leslie F. Kimmell, of Laguna Beach, for appellant.

Keogh, Cate & Colver, of Los Angeles, and Harvey & Harvey, of Santa Ana, for respondents.

BARNARD, Presiding Justice.

The plaintiff executed and delivered a promissory note and a trust deed securing the same which covered two separate parcels of real property, one situated in the city of Newport Beach and the other in the city of Laguna Beach. After default, the property was sold under the terms of the trust deed. The plaintiff brought this action to set aside the sale and to quiet title to the property in himself. The defendants answered and filed a cross-complaint asking that title be quieted in them. The matter was submitted to the court on a stipulation as to the facts, from which it appears that a notice of sale of the property was published in a newspaper in the city of Newport Beach, and that no such notice was ever published in any newspaper printed and published in the city of Laguna Beach. From a judgment denying relief to the plaintiff and quieting title in the defendants and cross-complainants, this appeal is taken.

It is conceded that this sale was regular in all other respects, and the only question here presented is whether the publication of the notice of sale was insufficient, since the same was not published in a newspaper printed and circulated in each of the cities named. This depends upon the meaning of that portion of subdivision 3 of section 692 of the Code of Civil Procedure, reading as follows: "* * * And publishing a copy thereof once a week for the same period, (in) some newspaper of general circulation printed and published in the city in which the property or some part thereof is situated, if any part thereof is situated in a city. * * *"

The appellant argues that the meaning of "the property" in the quoted portion of the statute is in doubt and calls for interpretation; that the words "the property or some part thereof" should be interpreted to mean "the parcel or some part thereof"; that the purpose of the statute is to give the best possible notice of the sale; that the interpretation contended for would contribute to that result; and that with this purpose in mind it must be held that the Legislature intended to provide for the publication of such a notice in each city in which any parcel or part of a parcel of the real property is situated.

The argument that publication in both of these cities would tend to give a better notice of the intended sale, could be more appropriately made in a legislative forum than here. As adopted, the statute provides for such publication in the city in which "the property" or "some part thereof" is situated. "Thereof" can only refer to the property to be sold, and the reference to "some part" of this property negatives the idea that each part was intended. No provision is made in the statute for a different procedure in cases where more than one parcel of land is to be sold, and where the respective parcels are noncontiguous. Only one sale is provided for, and the provision for notice refers to "the property" to be sold only, a reference which naturally relates to the entire property, regardless of whether or not it consists of more than one parcel. The further reference to "some part thereof" relates to "the property," and it cannot be said that it relates to some part of each parcel of the property unless we put into the statute something that is not there. The words "the property" cannot be interpreted as meaning "the parcel" without doing violence to all rules of statutory construction. Such a construction would be a substitution rather than an interpretation. Had the Legislature desired to provide for the publication of such a notice in each city where a parcel of the land was situated, such a provision could have been easily and simply made.

In speaking of a contention similar to [illegible] here made by the appellant and one made under circumstances almost identical with those here presented, the court said in Paulle v. Wallis, 58 Minn. 192, 59 N. W. 999: "That interpretation requires a reconstruction of the statute, leaving out words that are used, and bringing in other words. We see no reason calling for that. The statute must be taken as it reads."

We conclude that this portion of the statute in question was correctly interpreted and applied by the trial court. Notice was here published in a city in which some part of the property to be sold is situated, and we may not read into the act a different and additional requirement.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

2 Cal.App.2d 73

ALEXANDER v. WILLIS et al.

Civ. 8763.

District Court of Appeal, Second District,
Division 2, California.
Nov. 7, 1934.

Automobiles 🔑244(9)

Evidence *held* insufficient to establish motorist's negligence where motorist was proceeding at speed of 20 to 25 miles per hour and applied brakes immediately upon seeing pedestrian appear from in front of street car and had stopped automobile immediately after accident.

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by Elizabeth Alexander against Harry G. Willis and another and against the Pacific Electric Railway Company. From an order granting motion for nonsuit, plaintiff appeals.

Affirmed.

A. W. Staples and Walter S. Coen, both of Los Angeles, for appellant.

Gardiner Johnson and Gordon Johnson, both of San Francisco, for respondents.

SCOTT, Justice pro tem.

Plaintiff appeals from order granting motion for nonsuit. Defendant Harry G. Willis was driving his automobile on Pasadena avenue near the intersection of avenue 35, at

4:15 p. m. on a midsummer day. For several blocks he had been trailing a South Pasadena bound street car, in heavy traffic, and was even with it when nearing and passing the intersection named. Both street car and automobile were going north. Standing on the west curb, plaintiff saw the approaching street car and hurriedly crossed the street, going in a diagonal direction, to the southeast and in front of the street car, which was slowing up. As she passed to the east of the most easterly rail, clear of the path of the street car, she came in contact with respondent's automobile. The latter had been continuing north by the side of the street car at a speed from 20 to 25 miles per hour. As plaintiff came into view in front of the street car, respondent saw her, about 15 feet away, and at once applied his brakes. His left front fender came in contact with plaintiff, whereupon respondent swerved to the right and parked at the curb. The street car in the meantime had come to a full stop, at a point where there was no intersection nor a regular loading zone.

A reading of the reporter's transcript in this case, by way of supplementing the portions quoted in the briefs, does not disclose any evidence of negligence on the part of respondent.

Judgment affirmed.

We concur: STEPHENS, P. J; CRAIL, J.

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2 Cal.App.2d 118

ROSENBERG v. BULLARD.

Civ. 5107.

District Court of Appeal, Third District, California.

Nov. 8, 1934.

Hearing Denied by Supreme Court Jan. 7, 1935.

Appeal and error 🔑436

Appeal from order setting aside judgment by default against nonresident defendant and vacating attachment brought cause before court of review on its merits, so that upon taking of appeal trial court was without jurisdiction to try cause until appeal was terminated (Code Civ. Proc. § 946).

Appeal from Superior Court, Los Angeles County; Edward F. Hahn, Judge.

On rehearing.

Judgment reversed.

Prior opinion, 34 P.(2d) 729.

Wm. Ellis Lady and Guy Knupp, both of Los Angeles, for appellant.

Goldman & Lieberman, of Los Angeles, and J. M. Inman, of Sacramento, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This appeal is before us on rehearing. The contention of appellant is that the trial court was without jurisdiction to enter the judgment here complained of.

Defendant was a nonresident. An action was commenced against her and a writ of attachment was issued and levied upon certain real property belonging to her situate in this state. Upon her failure to answer, default was taken. Thereafter she appeared specially and moved to dissolve such attachment and to vacate and set aside the judgment. The motion, in both particulars, was granted. From this order plaintiff appealed. Thereafter, and while said appeal was pending, defendant moved that the cause be set down for trial, and supported the motion by affidavit that she would suffer irreparable injury if the cause were not disposed of, as the title to her property was clouded, etc. The motion was granted and the cause was set for trial and duly tried, resulting in a judgment for plaintiff. It is an appeal from this latter judgment which brings this matter before us. In the meantime, the appeal from the order setting aside the judgment by default and vacating the attachment had been affirmed.

Appellant urges various grounds for reversal, but we will notice but one, and that one compels a reversal.

Upon the taking of the appeal from the order setting aside the judgment by default and vacating the attachment, the trial court was without jurisdiction to proceed until that appeal had been terminated. Code Civ. Proc. § 946; 2 Cal. Jur. p. 415. It is immaterial, although unfortunate, that the cause was brought to trial pending the appeal, upon the solicitation of defendant. It is a question of jurisdiction and not of estoppel.

Respondent urges that the cause was not before the court of review upon its merits upon the first appeal; the question being, so respondent contends, as to the regularity of the attachment only, which it is urged is a collateral matter only. With this we cannot agree. The defendant being a nonresident, no personal judgment could be rendered against her. Any judgment so rendered was enforceable only to the extent of the property attached. An attack upon the validity of the attachment had as its real purpose an attack upon the validity of the judgment itself, which under the circumstances would of necessity fall if the attachment failed. The record discloses that the appeal was both upon the motion to dissolve the attachment and from the judgment of default, and such appeal affected the entire cause, for a judgment by default is a judgment upon the merits. Brown v. Brown, 170 Cal. 1, 147 P. 1168.

Determinative of the question here presented, namely, the jurisdiction of the trial court to proceed pending the appeal, is the case of People v. Sonoqui, 35 P.(2d) 123, decided by the Supreme Court while the instant case was being considered on rehearing. In the cited case defendants and appellants had been convicted of murder. A motion for a new trial was made and granted, from which order the people duly appealed. Shortly thereafter the district attorney, representing the people, moved the District Court of Appeal wherein the matter was pending to dismiss the appeal, which motion was granted, the defendants consenting thereto. No attempt was made to secure a remittitur, but a certified copy of the order dismissing the appeal was obtained from the appellate court and filed in the trial court. Four days after the entry of the order of dismissal defendants were again put on trial and duly convicted of murder in the first degree.

On the date fixed for the pronouncing of judgment, defendants moved in arrest of judgment on the ground that the court was without jurisdiction to enter the same, inasmuch as the order dismissing the former appeal of the people had not become final nor had a remittitur issued thereon.

We will not attempt to summarize the reasons given by the Supreme Court nor the various citations set forth in support thereof; the court holding, however, that the trial court did not have jurisdiction to try the cause and the motion in arrest of judgment should have been granted.

Upon the authority, therefore, of the case of People v. Sonoqui, supra, the judgment heretofore entered in the instant case must be reversed. It is so ordered.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

1 Cal.App.2d 144

Katie KARLE, Respondent, v. James A. REED et al., Appellants.

Civ. 1115.

Supreme Court of California.
Nov. 26, 1934.

In Bank.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

On rehearing.

Rehearing Denied.

Prior opinion, 36 P.(2d) 150.

Harry P. Sweet, of San Diego, and Joe Crider, Jr., of Los Angeles, for appellants.

Glen H. Munkelt, of San Diego, for respondent.

PER CURIAM.

The petition for a hearing is denied. In denying a hearing, however, we think that the judgment should be affirmed under the provisions of article 6, § 4½, of the Constitution, and we withhold approval of that portion of the opinion of the District Court of Appeal which deals with the admissibility of the contract provision and the propriety of the instruction of the trial court thereon.

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2 Cal.2d 1

GREEN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

S. F. 15163.

Supreme Court of California.
Nov. 19, 1934.

1. Pardon 🔑4

Constitutional provision relating to grant of pardons and commutation of sentences of convicts twice convicted must be construed in light of criminal procedure at time framers of Constitution were considering and debating language of provision (Pen. Code, § 954; Const. art. 7).

2. Pardon 🔑4

Where accused was convicted under both counts of indictment charging first-degree murder and burglary and Governor commuted death sentence to life imprisonment without having received recommendation of majority of Justices of Supreme Court, Superior Court wherein accused was convicted could not thereafter reimpose death sentence, since Governor had power to grant executive clemency without recommendation of Supreme Court Justices (Pen. Code, §§ 954, 1227; Const. art. 7).

◆

In Bank.

Application by Jack D. Green for a writ of certiorari to review an order of the Superior Court of Los Angeles County, B. Rey Schauer, Judge, fixing a date for execution of the death penalty upon petitioner after the sentence of death had been commuted to life imprisonment, to which application respondent demurred.

Demurrer overruled, order set aside, and writ granted.

R. Lee Bagby, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy C. Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

WASTE, Chief Justice.

The petitioner, Jack D. Green, was jointly charged with John Francis Regan, by an indictment in two counts, and they were convicted in the respondent Superior Court of the crimes of murder in the first degree and burglary. The death penalty was imposed on each defendant for his participation in the murder, and on appeal this court affirmed the judgment and orders of the lower court. People v. Green et al., 217 Cal. 176, 17 P.(2d) 730. After affirmance of the judgment, Regan was executed. On application by Green to his Excellency, Governor James Rolph, Jr., the chief executive commuted the sentence of Green from death to life imprisonment, with certain conditions and restrictions not here material. Since that time, petitioner has been, and now is, in the state prison at San Quentin, where he is serving out the commuted sentence.

After the affirmance of the judgment in this court, and subsequent to the commutation of the sentence to life imprisonment, Honorable B. Rey Schauer, judge of the respondent court by whom the trial of the indictment was conducted, and who, in the discharge of his official duty, had imposed the death penalty on the two defendants, issued an order resentencing the petitioner, and again fixing the death penalty. By this writ of review petitioner seeks an annulment of this last order of the respondent court.

It is the contention of the respondent that the petitioner has been "twice convicted," within the meaning of article 7, of the state Constitution relating to the pardoning power of the chief executive. The commutation of the sentence of petitioner, it is admitted, was not granted upon the written or any recommendation of a majority of the Justices of the Supreme Court. It is, therefore, the theory of the respondent that the purported commutation by the Governor of petitioner's sentence is a nullity and must be disregarded. The judgment of death not having been executed, respondent contends it was its duty, under the provisions of section 1227 of the Penal Code, to appoint a day upon which the judgment should be executed. That is the order petitioner seeks to have annulled. Respondent has demurred to the petition.

Respondent correctly states the issue thus: "The two key words of the constitutional provision here in issue are the words 'twice convicted.'" It maintains that the petitioner has been "twice convicted" within the meaning of the Constitution because the jury found the petitioner guilty upon the two counts of the indictment, each charging a separate felony. No authorities are cited by either party on the precise point thus stated, but each of them relies upon the construction of certain language used in the debates in the convention when the Constitution of 1879 was being framed.

[1, 2] We are of the opinion that the language of the Constitution relating to the granting of pardons to and commutation of sentences of convicts "twice convicted" must be construed in the light of criminal procedure in this state at the time the framers of the Constitution adopted in 1879 were considering and debating its language. The Constitution of 1849 contained no provision relating to that subject. At that time it was permitted in this state to charge "but one offense" in an indictment. Pen. Code, § 954, as amended in Code Amendments 1873–74, p. 437. We think it unlikely that the framers of the Constitution had in mind a situation like the case now before us, and looked forward more than a third of a century to a time when an indictment or information might charge two or more different offenses, as permitted since the amendment of section 954 in 1915 (St. 1915, p. 744). We readily conclude, therefore, that in the case of petitioner the Governor was free to grant executive clemency without having the recommendation

of a majority of the justices of the Supreme Court.

This conclusion renders it unnecessary to enter into a discussion of the question: What is meant or implied in this state by the word "convicted," when used in connection with criminal accusations and resulting verdicts or judgments? No case presenting the exact issue raised in this application has been heretofore decided by this court; but, in the past, the same conclusion as we here arrive at has been reached and transmitted to the governor in connection with applications for executive clemency made by convicts claimed to be twice convicted. We find no reason for announcing any different conclusion.

The demurrer of the respondent court is, therefore, overruled. The judgment and order of the respondent court (department 21), made and entered on the 28th day of March, 1934, appointing a day upon which the judgment of the court imposing the death penalty upon the petitioner, Jack D. Green, should be executed, is hereby annulled, vacated, and set aside. Let a remittitur issue forthwith.

We concur: THOMPSON, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

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2 Cal.App.2d 59

LOMBARD v. SWALL et al.

Civ. 5002.

District Court of Appeal, Third District, California.

Nov. 5, 1934.

1. New trial 🔑71

In action by motorist colliding with truck stopped on highway, grant of new trial to motorist *held* not abuse of discretion under evidence that highway was covered with wet snow making traveling unusually dangerous and conflict of evidence as to whether taillights on truck trailer were burning (Code Civ. Proc. § 657).

2. New trial 🔑72

On motion for new trial, it is sole province of trial judge to determine weight and sufficiency of evidence (Code Civ. Proc. § 657).

3. Automobiles 🔑245(83)

Motorist colliding with truck stopped on highway on dark and stormy night when highway was covered with snow *held* not as matter of law guilty of contributory negligence.

4. Appeal and error 🔑979(1)
New trial 🔑70

Trial judge is vested with sound discretion to determine on motion for new trial whether verdict is supported by evidence, and on appeal such discretion will not be interfered with unless it appears there is a clear abuse thereof (Code Civ. Proc. § 657).

5. Trial 🔑252(8)

Instruction that, if motorist's automobile colliding with truck was not equipped with brakes which enabled him to stop within limited number of feet when traveling at specified speed and if such defective brakes contributed to accident, he would be guilty of contributory negligence, *held* error where there was no evidence that automobile was equipped with defective brakes, nor that motorist applied his brakes, and highway was covered with wet and slippery snow (St. 1931, p. 2115, § 94).

6. Appeal and error 🔑854(6)

Order granting new trial on ground, among other things, of insufficiency of evidence will be sustained if it finds adequate support on any of grounds on which motion is presented (Code Civ. Proc. § 657).

7. New trial 🔑163(2)

Where new trial is granted in general terms, it is sufficient to cover any ground therefor on which motion is presented, except that court is required to specify that there is insufficiency of evidence to sustain verdict when new trial is based on such ground (Code Civ. Proc. § 657).

◆

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by L. L. Lombard against Harold Swall and others, as copartners, doing business under the firm name and style of A. Swall & Sons, and another. Verdict for defendants, and from an order granting a new trial, defendants appeal.

Affirmed.

Neumiller & Ditz and R. L. Beardslee, all of Stockton, for appellants.

Gumpert & Mazzera and C. H. Hogan, all of Stockton, and Erwin C. Easton, of San Francisco, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendants have appealed from an order granting a new trial in an automobile casualty case after a verdict had been returned in their favor. It is contended the judge abused his discretion in granting a new trial for the reason that there is no substantial evidence of the negligence of the defendants.

At 11 o'clock on the night of January 14, 1932, the defendant Ben Hicks was driving a heavily loaded truck and trailer belonging to the other defendants along the highway 4 miles east of Tracy. The paved portion of the highway at that point is 21 feet in width with an 8-foot shoulder on either side. A wet snow was falling. The highway was covered with a coating of snow. The truck and trailer were each equipped with two green clearance lights on either side, and the trailer had a red tail-light, all of which were burning at the time of the accident. Until just previous to the accident, the driver had experienced no engine trouble. There was no mechanical defect in the truck machine. It was equipped with good brakes. Hicks had observed two other automobiles following behind his truck. The nearest one, which was driven by S. W. Curtis, was about a block behind the truck, when suddenly, without previous warning, the carburetor of the truck began to splutter. Mr. Hicks testified that he immediately turned his truck toward the right-hand side of the highway and reached a point where the right wheels of his vehicle were off the concrete pavement about 2 feet on the shoulder of the roadway. The truck had run a distance of about one block after the trouble began when he brought it to a stop by applying the brakes. The instant that the truck stopped, the plaintiff's Chrysler sedan crashed into the rear end of the trailer and the plaintiff was seriously injured. Hicks said that he had been running at the rate of 25 or 30 miles an hour prior to the time when the carburetor began to splutter. He knew the other cars were following in close proximity. He also knew that the highway was covered with wet snow, and that snow was obscuring the vision to some extent by adhering to the windshield. After he stopped, it appears that he merely switched the gasoline feed to another tank and the truck continued to run without further difficulty.

Mr. Curtis testified that he was driving an Oakland coach at the rate of about 20 miles an hour, and that his vision was blinded by the accumulation of snow on his windshield and the glare of the headlights of the plaintiff's machine which was following about 50 feet behind his car. Suddenly he saw the dark object, which proved to be defendants' truck, about 20 feet ahead. There was also an approaching automobile on the left-hand side of the highway. He had not previously seen the defendants' truck. Nor had he seen the tail-light on the trailer. Believing that it would be impossible for him to stop in time to avoid a collision, he swerved around the right side of the truck, traveling on the shoulder of the highway, until he returned to the paved portion thereof ahead of the truck, where he stopped.

The plaintiff had not seen the truck which was traveling ahead of Curtis' machine. He testified that he was following at the rate of 18 or 20 miles an hour behind the Curtis car, when it suddenly disappeared around the right side of the truck. The rear end of the trailer suddenly loomed out of the darkness in front of his machine. He was unable to stop his automobile and crashed into the trailer, demolishing the front end of his car and seriously injuring himself.

The cause was tried with a jury, which rendered a verdict in favor of the defendants. A motion for a new trial was presented on all of the grounds specified by section 657 of the Code of Civil Procedure. The new trial was granted "on the ground, among other things, of insufficiency of the evidence." From this order granting a new trial, the defendants have appealed.

It is contended the court abused its discretion in granting a new trial for the reason that there is no substantial evidence of the defendants' negligence, and, on the contrary, that the evidence shows contributory negligence on the part of plaintiff as a matter of law. It is also asserted the record did not warrant the court in granting a new trial on any of the grounds specified in the notice of intention to move for a new trial, other than the insufficiency of the evidence.

[1, 2] We are unable to say there was an abuse of discretion on the part of the trial judge in granting a new trial on the ground of the insufficiency of the evidence to support the verdict. There is a clear conflict of evidence. While the driver of the truck testified positively that the tail-light on the rear end of his trailer was burning both before and after the accident, both Curtis and Lombard testified that they saw no red light before the accident, and that it positively was not burning after the accident oc-

curred. It was a dark and stormy night. The highway was covered with wet snow. Snow clung to the windshield and somewhat obscured the vision of the drivers of the vehicles. Traveling on the highway was unusually dangerous under such circumstances. The truck driver had carburetor trouble, in spite of which, he was able to propel his machine for a distance of about a block before he brought it to a stop. With knowledge of these facts and conditions, he stopped his truck, overlapping the concrete nearly the entire width of his machine, knowing that his vehicle was followed in close proximity by two other cars. We do not hold that this conduct on the part of the truck driver constitutes negligence. On a motion for new trial it is the sole province of the trial judge to determine the weight and sufficiency of the evidence. We may not hold as a matter of law that the trial judge abused his discretion in that regard in determining upon such evidence that a new trial should be granted.

[3] Nor can we say, as a matter of law, that the plaintiff was guilty of contributory negligence. This also was a question of fact to be determined by the trial judge on the motion for a new trial. We are of the opinion he did not abuse his discretion in that regard.

[4] The trial judge is vested with a sound discretion to determine, on motion for a new trial, whether the verdict is supported by the evidence, and, on appeal, that discretion will not be interfered with unless it appears there is a clear abuse thereof. Otten v. Spreckels, 24 Cal. App. 251, 141 P. 224; Petroff v. Nunes, 136 Cal. App. 416, 29 P.(2d) 293; 20 Cal. Jur. 27, § 13; 20 Cal. Jur. 111, § 71; Newman v. Overland Pac. Ry. Co., 132 Cal. 73, 64 P. 110.

[5] Moreover, we are of the opinion the court erred in giving to the jury an instruction which was offered by the defendants, based upon the provisions of section 94 of the California Vehicle Act (St. 1923, p. 545, as amended by St. 1931, p. 2115), to the effect that, if the jury found that the plaintiff's automobile was not equipped with brakes which enabled him to stop his car within a limited number of feet when traveling at a specified rate of speed, and that such defective brakes contributed to the accident, he would be guilty of contributory negligence which would preclude him from recovering a judgment in this case.

There is no evidence in the record that plaintiff's automobile was equipped with defective brakes. There is no evidence that the failure of his brakes caused or contributed to the accident. When the plaintiff suddenly saw the truck immediately ahead of his car, he did not know just what he did. He thought he threw the lever into neutral, but the crash occurred instantly. He said in that regard:

"Q. When you did see it [the truck], what, if anything, did you do? A. I don't know.

"Q. Did you apply your brakes? A. I don't know."

His emergency brake was not set, for he applied that brake after the accident occurred. It does not appear how close to the trailer his machine was when he first observed it. There is no evidence of the distance within which he had an opportunity to apply his brakes, to warrant the giving of an instruction based on the table of distances set forth in section 94 of the California Vehicle Act, to determine whether his brakes were defective in that regard. Moreover, that test of what is deemed to be adequate mechanical brakes is specifically fixed with reference to conditions including "dry asphalt or concrete pavement surface." The evidence is undisputed that the highway was covered with wet and slippery snow. The instruction is not applicable to the facts of this case as they are disclosed by the record.

[6, 7] When a new trial is granted "on the ground, among other things, of insufficiency of the evidence," the order will be sustained if it finds adequate support on any of the grounds upon which the motion is presented. When a new trial is granted in general terms, it is sufficient to cover any ground therefor, upon which the motion is presented, except that the court is required by the provisions of section 657 of the Code of Civil Procedure to specify that there is an "insufficiency of the evidence to justify the verdict," when the new trial is based upon that ground. Petroff v. Nunes, 136 Cal. App. 416, 423, 29 P.(2d) 293; Mercantile Trust Co. v. Sunset Road Oil Co., 176 Cal. 461, 168 P. 1036, 1037. In the present case it is evident from the language of the trial court that the new trial was granted on the ground of "insufficiency of the evidence" and upon other grounds not specified in the order.

The order is affirmed.

We concur: **PULLEN, P. J.; PLUMMER, J.**

2 Cal.App.2d 252

Ex parte STEWART.

Cr. 2604.

District Court of Appeal, Second District, Division 2, California.

Nov. 15, 1934.

1. Habeas corpus ⚷29

If complaint in its charge against defendant completely fails to include some essential element necessary to description of crime, and commitment has issued out of justice's court or other court of inferior grade, lack of jurisdiction is established.

2. Drunkards ⚷11

Complaint *held* to sufficiently charge offense of having unlawfully appeared in intoxicated condition on public highway was committed by defendant in unincorporated territory of county, notwithstanding omission of words "in unincorporated territory" (Pen. Code, § 1426).

> Complaint that on a stated date, "at Valley Blvd., near Spadra, San Jose Township, outside of Los Angeles city, in the county of Los Angeles, State of California, the crime of Vio. Co. Ord. 1735 N. S. Misdemeanor" was committed by defendant, charged an offense, since the language "outside of Los Angeles city, in the county of Los Angeles," and "the crime of Vio. Co. Ord. 1735 N. S. Misdemeanor," read together and in conjunction with the whole complaint, and with the common and popular understanding that the phrase "in the county," when referring to governmental jurisdiction, means outside an incorporated city, conveys and necessarily imports the meaning that the described place was in unincorporated territory of Los Angeles county, and hence the omission in the complaint of the words "in unincorporated territory" did not result in complete failure to include an essential element of the crime charged.

◆

Habeas corpus proceeding by Floyd Stewart, who had been held in custody under commitment issued out of justice's court of San Jose township, in the county of Los Angeles.

Writ discharged, and petitioner remanded to custody.

Alexander L. Oster, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

WILLIS, Justice pro tem.

The return to the writ shows that petitioner was, until released on bail herein, held in custody under commitment issued out of the justice's court of San Jose township, in the county of Los Angeles, pursuant to judgment entered in said court in an action by the people against petitioner and by which he was sentenced to imprisonment in the county jail for a period of six months.

The complaint in that case, to which petitioner pleaded guilty, charged that on a stated date, "at Valley Blvd., near Spadra, San Jose Township, outside of Los Angeles city, in the county of Los Angeles, State of California, the crime of Vio. Co. Ord. 1735 N. S. Misdemeanor was committed by Floyd Stewart, who at the time and place aforesaid did wilfully and unlawfully appear in an intoxicated condition upon a public highway, towit: the Valley Blvd., near Spadra." The ordinance referred to, in its pertinent parts, reads as follows: "It shall be unlawful for any intoxicated person, or any person in an intoxicated condition, wilfully to appear, remain or be in or on any public highway, street, alley, way, park, playground or public place in the unincorporated territory of the county of Los Angeles, whether such person is or is not in or upon any automobile, street, or interurban car, vehicle or conveyance." Petitioner contends that the complaint failed to charge the commission of any crime, in that it did not allege that the offense occurred in unincorporated territory of the county.

[1, 2] It is the accepted rule that if the complaint in its charge against the defendant completely fails to include some essential element necessary to the description of a criminal act, and commitment has issued out of a justice's court or other court of inferior grade, the lack of jurisdiction is established. Ex parte Greenall, 153 Cal. 767, 96 P. 804; In re Hernandez, 64 Cal. App. 71, 220 P. 423. In this case it was essential to include in the complaint allegations sufficient to show that the offense charged was committed in unincorporated territory of the county, and the sole question herein is, did it do so?

Section 1426 of the Penal Code prescribes the form and contents of a complaint in a justice's or police court. It must be under oath, setting forth the offense charged with such particulars of time, place, person, and property as to enable the defendant to understand distinctly the character of the offense complained of and to answer it. Such statement may be made in ordinary and concise language, without any allegations of matter not essential to be proved. It may be in any words sufficient to give the accused notice of the offense of which he is accused. Measuring the allegations of the complaint herein by the terms of this section of the Penal Code, we are satisfied that the conditions therein have been substantially complied with. The particulars of time, place, person, and offense of which he is charged, so as to give the accused notice thereof sufficient to enable him to distinctly understand it and to answer it, are therein stated. The language "outside of Los Angeles city, in the county of Los Angeles," and "the crime of Vio. Co. Ord. 1735 N. S. Misdemeanor," read together and in conjunction with the text of the whole complaint and with the common and popular understanding that the phrase "in the county," when referring to governmental jurisdiction, means outside an incorporated city, conveys and necessarily imports the meaning that the described place was in unincorporated territory of Los Angeles county. Hence the omission in the complaint of the words "in unincorporated territory" did not result in complete failure to include an essential element of the crime charged. The element of place or location distinctly appears, and the provisions of section 1426 of the Penal Code are sufficiently complied with to sustain the judgment based thereon after plea of guilty.

The writ is discharged, and petitioner is remanded to custody.

We concur: STEPHENS, P. J.; CRAIL, J.

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2 Cal.App.2d 180

WALSH v. BOARD OF TRUSTEES OF REDLANDS HIGH SCHOOL DIST. et al.

Civ. 1504.

District Court of Appeal, Fourth District, California.

Nov. 10, 1934.

Hearing Denied by Supreme Court Jan. 7, 1935.

1. Schools and school districts 🔑133

Services of teacher of vocal music in "junior high school" and "senior high school" should be considered as two separate "positions" within teachers' tenure statute, bringing case within intent of statute that teacher may acquire permanent standing by service in two positions (School Code, §§ 5.710, 5.711, and § 5.500, as added by St. 1931, p. 1394, § 4).

A modern "senior high school" is usually confined to the last three years of the former high school course, and offers instruction which is designed for older and more advanced students, applying different methods, allowing more freedom both in choice of subjects and from routine followed in schools of lower grade, and being in many respects comparable to colleges of a generation or two ago, whereas "junior high school" usually covers work formerly done in first year of senior high school together with work formerly given in last two years of elementary grades.

[Ed. Note.—For other definitions of "Position," see Words & Phrases.]

2. Schools and school districts 🔑133

Right accruing to teacher on obtaining permanent standing through service in two positions may be lost as to one and kept as to the other, where work is discontinued in one case and not in the other (School Code, §§ 5.710, 5.711, and § 5.500, as added by St. 1931, p. 1394, § 4).

3. Schools and school districts 🔑133

Teaching vocal music in senior high school is "particular kind of service" in district within teachers' tenure statute, and discontinuance thereof ends tenure rights which have been acquired thereunder, regardless of whether similar subject is continued in junior high school, maintained in same district (School Code, §§ 5.710, 5.711, and § 5.500, as added by St. 1931, p. 1394, § 4).

[Ed. Note.—For other definitions of "Particular Services," see Words & Phrases.]

4. Schools and school districts 🔑133

Teaching of vocal music in senior high school constitutes "particular kind of service" in district within teachers' tenure statute, and, as such, it may be discontinued when finances or other reasons demand, and, when such particular service is discontinued, "position" of teaching it is abolished (School Code, §§ 5.710, 5.711, and § 5.500, as added by St. 1931, p. 1394, § 4).

5. Schools and school districts 🔑133

Standing as "permanent teacher" is related, not only to subject taught, but to position occupied and kind of school where probationary period was passed, which right of tenure is the right the teacher enjoys to continue in position to which he has become elected, and which is equivalent to that occupied for probationary period.

[Ed. Note.—For other definitions of "Permanent Teacher," see Words & Phrases.]

Appeal from Superior Court, San Bernardino County; Benjamine F. Warner, Judge.

Mandamus proceeding by Margaret Walsh against the Board of Trustees of Redlands High School District and others. From an adverse judgment, respondents appeal.

Reversed.

Hearing denied by Supreme Court; LANGDON, J., dissenting.

Stanley Mussell, Dist. Atty., and James L. King, Deputy Dist. Atty., both of San Bernardino, for appellants.

Heap & Butler, J. Lamar Butler, and Richard H. Cantillon, all of Los Angeles, for respondent.

BARNARD, Presiding Justice.

The petitioner applied for a writ of mandate to compel the respondents to reinstate her to full-time work as a teacher in the Redlands High School district for the year 1932-1933 and to pay her certain additional salary for that school year. Judgment was entered in favor of the petitioner, and the respondents have appealed. For convenience, the parties will be herein referred to as the petitioner and the respondents, respectively.

A junior high school and a senior high school are maintained in the respondent district in accordance with the provisions of law. Prior to the school year of 1932-1933, the petitioner had been employed for more than three years by the respondent district, during which time she had taught vocal music for four periods a day in the senior high school and the same subject for two periods a day in the junior high school. Early in May, 1932, the teaching of vocal music in the senior high school was entirely discontinued and abolished by action of the respondent board, and notice thereof was given to the petitioner on May 3, 1932. The teaching of vocal music in the junior high school was not abolished at that time, but was continued during the school year 1932-1933. During the preceding two years another teacher had also taught vocal music in the junior high school, teaching six periods a day. She was still a probationary teacher, not having reached a permanent status, and her services were continued during the school year 1932-1933 for the full six periods a day. The petitioner was offered a contract to teach this subject in the junior high school for two periods a day, as before, and she continued to teach those periods during the school year 1932-1933, warrants in payment for that service being issued and delivered to her. During this year she brought this action asking that the respondents be compelled to reinstate and pay her as a full-time teacher in the district for that year.

[1] The sole contention of the petitioner is that since she had acquired status as a permanent teacher through teaching vocal music she was entitled to full-time work in that subject so long as six classes in vocal music were maintained anywhere in the district. Her claim is thus set forth by the petitioner: "It is our contention that a permanent teacher, by virtue of her rights secured under the tenure law, has the right to teach the particular subject which she is qualified to teach, in preference to a probationary teacher in the event there is a decrease in the number of teachers hired for a particular subject. * * * Therefore, she has acquired, by virtue of the Teachers' Tenure Law, a preferential right to teach vocal music as against a probationary teacher."

The statutes give a permanent teacher a preferential right over a probationary teacher where the number of teachers is reduced because of a decrease in the number of pupils, but give no such right where the number of permanent teachers is reduced "on account of the discontinuance of a particular kind of service in such district." School Code, §§ 5.710 and 5.711. The main question here is whether the discontinuance of teaching vocal music in this senior high school while the teaching of the same subject was continued in the junior high school is "a discontinuance of a particular kind of service in the district" within the meaning of the statute. A closely related question is whether an employment as teacher of a certain subject in both a senior high school and a junior high school, which has resulted in a permanent status, constitutes one position or two positions within the meaning of the School Code.

In Cullen v. Board of Education, 126 Cal. App. 510, 15 P.(2d) 227, 228, 16 P.(2d) 272, it was held that a teacher who had been teaching partly in a day high school and partly in an evening high school was in the same situation as one teaching in two or more day high schools in the same district. It was further held that the two assignments constituted but one "position" within the meaning of the tenure law. In denying a hearing in that case, the Supreme Court withheld its approval of the latter proposition. It made no difference in the decision of that case whether the two assignments were considered as one position or two positions, since both assignments were in the same district, in schools of the same class and kind, and since there was no suggestion that the work the teacher had been doing under one assignment had been discontinued.

In the case now before us, the petitioner had been teaching, not merely in two schools of the same kind which might be in different buildings, but in two schools which differ materially in kind and character. With the growth of our educational system, the modern senior high school, usually confined to the last three years of the former high school course, offers instruction which is designed for older and more advanced students, applying different methods, allowing more freedom both in the choice of subjects and from the routine followed in schools of a lower grade, and being, in many respects, comparable to the colleges of a generation or two ago. The junior high schools, a more recent development, usually cover the work formerly done in the first year of the senior high school, together with the work formerly given in the last two years of the elementary grades. A very marked change takes place in children about the time they leave a junior high school and enter a senior high school, and both the subject-matter taught and the method of teaching and handling pupils is quite different in the two classes of schools. The difference between these two kinds of schools is so marked that, in our opinion, it should not be held that a person teaching classes in both schools at the same time is holding one position only, although the employer in each case is the same district.

Section 5.500 of the School Code (as added by St. 1931, p. 1394, § 4), provides for permanent classification where a teacher is reelected after having been employed by a district for three consecutive school years "in a position, or positions." The use of the plural here indicates that permanent status may be achieved by the required service in one position or in more than one position. And this could not refer to positions in different districts or under different boards, because the continuous service must have been for the same employer. Gould v. Santa Ana High School Dist., 131 Cal. App. 345, 21 P.(2d) 623. In the case first above cited, the Supreme Court desired to leave open the question as to whether or not teaching in a day high school and in an evening high school constitutes more than one position. Be that as it may, it would seem that a teaching service in two schools which are totally different in kind and nature should be held to constitute two positions rather than one, and that the classification statute in question was intended to and does cover such a situation. A junior high school and a senior high school are two separate institutions, and the distinction between "position" and "positions" which appears in the statute must have been intended to cover a situation where work is done in schools of such a separate and distinct character, whether or not it can ever apply where work is done in schools of the same class and kind. We conclude that the two classes of service performed by the petitioner in these two schools are to be considered as two separate positions, and that the facts of this case bring it within the intention of the statute that a teacher may acquire a permanent standing by service in two positions.

[2] If this be true, it would seem to follow that the right accruing to a teacher on obtaining permanent standing through service in two positions may be lost as to one and kept as to the other, where the kind of work done during the probationary period, which gave rise to the right, is discontinued and abandoned in the one case and not in the other.

[3] Turning to the question as to how the right acquired by service in either position may be lost, aside from dismissal for cause, section 5.710 provides that a permanent employee may be dismissed because of a decrease in attendance or because of the discontinuance of a particular kind of service in the district. Section 5.711 provides for a preference over employees with a less period of service where the dismissal results from a decrease in attendance, but no such provision applies when the other reason governs. The latter ground of dismissal is the only one material here, and no preferential right exists if the discontinuance of the particular work here in question had the effect of abolishing one position held by the petitioner, being the one based upon her previous work in the senior high school.

We think the kind of service which may be discontinued, permitting the dismissal of a permanent teacher, may vary according to the circumstances, and that, among other things, it is not limited to a particular subject alone, but may consist of a subject which has been taught for a particular purpose. For example, a teacher of mathematics might be employed in a senior high school to give certain instruction for the purpose of facilitating other work being given in some science. If this latter work were later abandoned, together with the mathematics course in connection therewith, the statute here in question should not be interpreted as giving this mathematics teacher, although thus employed for more than three years, the right to oust another teacher of lower mathematics who was teaching younger children in another kind of school, on the sole ground that he had acquired his permanent tenure as a mathematics teacher. For such a special subject was taught for a special purpose, and the discontinuance of the same means that a particular kind of service in the district has been discontinued.

[4] Similarly, we think the "particular kind of service" contemplated by this statute may be the teaching of a subject in a particular kind of school. As already pointed out, a senior high school differs materially from a junior high school. While some of the subjects taught in a senior high school may be regarded as a necessary continuation of similar work in the junior high school, other subjects which may be taught in the one may be less essential in the other, and may or may not be taught there, depending upon available funds and many other conditions. Vocal music is a good example of such a subject. The teaching of music in school classes is designed, not to make finished musicians, but merely to give a broad general training for its cultural value and perhaps for its value in arousing an interest in such individuals as are qualified to go on with private lessons. It is an optional subject in either a junior or a senior high school, and, even where such instruction is furnished for the younger students, it may or may not be continued in the senior high school. If the board furnishes such further and additional service in a senior high school, we think it constitutes a "particular kind of service" in the district within the meaning of the statute, and that, as such, it may be discontinued when finances or other reasons demand.

When such a particular service is discontinued, the "position" of teaching the same is abolished. And a teacher who happens to also hold another "position" teaching that same subject in a different kind of school is not entitled to oust another teacher in a lower class of school on the sole ground that the general subject is still taught in that school and that her permanent standing entitles her to teach that general subject anywhere and under any circumstances where and under which it may be taught.

[5] We think a standing as a permanent teacher is related, not only to the subject taught, but to the "position or positions" occupied, and to the kind of school or schools where the probationary period was passed. As the court said in Cullen v. Board of Education, supra: "This right of tenure is a right which the teacher enjoys to continue in the position or positions to which he has become elected under the statute—i. e., in a position or positions of a rank and grade equivalent to that occupied for the probationary period and to which the teacher has thus become 'elected' under the statute."

By reason of two positions held, the petitioner here had acquired permanent standing in each. She could not be capriciously removed from either without being given one of equivalent rank and grade if one existed, but, when all such service of the rank and grade of one of the positions held was discontinued in the district, the statute permits her dismissal from that position. It fully appears that the petitioner here is not demanding work in this subject of a rank and grade equivalent to that which she lost, for none of that rank and grade remains in the district, but she is asking that she be given a new and further position of a lower rank and grade on the ground that the teaching of this subject, alone and of itself, entitles her to teach the same in any kind of school and without regard to the rank and grade of the position previously occupied and which has been abolished.

The petitioner does not claim the right to an additional four hours' work in the junior high school on the ground that she is qualified to do that work and had already taught two periods of that work in that school. She claims the additional right on the ground that she had acquired permanent standing as a full-time teacher through teaching this subject in both schools. In other words, she maintains that her rights as a permanent teacher have accrued from the subject taught, without regard to where it was taught. If she is right in her contention, she would be entitled to teach full time in the junior high school if she had done no work at all in that school, because the subject taught by her was continued in that school which is run by the same district. In our opinion, this statute was never intended to treat teachers as interchangeable between a junior high school and a senior high school without regard to qualifications or anything except the fact that one general subject may have been taught in both. It was never intended to provide by this statute that a subject taught in a senior high school could not be discontinued without automatically transferring the teacher thereof to an entirely different sort of school.

We conclude that teaching vocal music in a senior high school is a particular kind of service in a district within the meaning of this statute, and that a discontinuance thereof ends tenure rights which have been acquired thereunder, regardless of whether or not a similar subject is continued in a junior high school maintained in the same district.

The judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.

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2 Cal.App.2d 124

DE LUCA v. RED SALMON CANNING CO.

Civ. 9145.

District Court of Appeal, First District, Division 1, California.

Nov. 9, 1934.

1. Seamen 🔑2

Seaman who signed shipping articles calling for services as seaman, stevedore, and fisherman *held* entitled to recover for injuries received while performing stevedore's duties under Jones Act as against contention that recovery should be under longshoremen's act, since while performing duties he was still crew member, was under orders of ship's officers, and received injuries in regular course of employment (Jones Act § 33 [46 USCA § 688]; Longshoremen's and Harbor Workers' Compensation Act [33 USCA § 901 et seq.]).

2. Appeal and error 🔑999(3)

In action by seaman for injuries, jury's finding that release was misunderstood, implied from verdict in seaman's favor, would not be disturbed.

3. Damages 🔑132(13)

Verdict of $18,000 for loss of two fingers by seaman *held* excessive, and should be reduced to $8,000.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Sebastiano De Luca against the Red Salmon Canning Company. Judgment for plaintiff, and defendant appeals.

Modified and affirmed.

F. V. Keesling, C. A. S. Frost, and Garton D. Keyston, all of San Francisco, for appellant.

Joseph E. Isaacs, Alan H. Critcher, and Henry Heidelberg, all of San Francisco, for respondent.

JAMES, Justice pro tem.

In 1930 the plaintiff signed shipping articles with the defendant corporation, engaging to work on defendant's steamship Hyades out of San Francisco for the Alaska fishing grounds in the triple capacity of seaman, stevedore, and fisherman. While working in the hold of the vessel, unloading the cargo at their port of call in Alaska, the plaintiff was struck by a sling load of lumber, which threw him against some pieces of structural iron, resulting in a bruise of his wrist from which developed an arterial disease—the result of which has been the loss of two of his fingers. The case was tried before a jury in the lower court, and resulted in a judgment for the plaintiff in the sum of $18,000. The action is prosecuted under the provisions of a federal statute known as the Jones Act (section 33 [46 USCA § 688]).

[1] It is contended by appellant that, because the plaintiff was engaged in unloading the cargo in port, he was acting as a stevedore and not as a member of the crew of the vessel, and that therefore he would be relegated to the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 USCA § 901 et seq.) for his relief, and would be excluded from any benefit under the provisions of the Jones Act.

The authorities cited by appellant on this score are not convincing. Plaintiff signed the shipping articles as a member of the crew, and was ordered into the hold of the vessel to unload the cargo. He was still a member of the crew and was performing these labors under order of his superiors on the vessel; and while so engaged received the injury complained of in the regular course of his employment. The action, therefore, falls under the provisions of the Jones Act.

There was sufficient evidence of negligence to support the judgment, and we find no reason for a reversal thereof upon that ground.

We can find in the evidence nothing which would justify the defense of assumed risk.

[2] Defendant has set up a release signed by the plaintiff after the occurrences in question, and relies upon the same as a defense to the action. This release was both pleaded

and proved in the trial, and the plaintiff's answer thereto was an ignorance of its contents on his part. Considerable evidence was adduced regarding the circumstances under which this release was executed, and the jury was fully and properly instructed upon that phase of the case. By its verdict in plaintiff's favor the jury impliedly found that the release was not understood by the plaintiff when he executed the same, and this court, of course, will not go behind that implied finding.

We have examined the instructions, which are challenged by appellant, and find no errors therein, which would justify a reversal.

[3] Appellant finally complains of the amount of the verdict as being excessive, and with this contention we are inclined to agree. The plaintiff lost two fingers of his major hand. It may be noted that one of these fingers had been deformed since youth. There is some evidence in the record of a further loss in the future—all of which is conjectural. The size of this verdict for the extent of the injury would seem to us to be so far out of line as to suggest that it was rendered under the influence of passion or prejudice. We believe that any judgment in this case beyond the sum of $8,000 would be excessive. It is accordingly ordered that the judgment herein be reduced to the sum of $8,000, and the judgment, as so reduced, is hereby affirmed, the appellant to recover the costs of appeal.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

1 Cal.App.2d 682

ALBERTS v. LYTLE et al.

Civ. 8696.

District Court of Appeal, Second District, Division 2, California.

Oct. 31, 1934.

Hearing Denied by Supreme Court Dec. 27, 1934.

1. Street railroads ⇨81(3)

Motormen must operate their cars consistent with ordinary care and at reasonable rate of speed, taking into account conditions and circumstances existing at given time and place.

2. Street railroads ⇨85(4)

Street cars have no absolute or pre-eminent right of way over intersections, but must use same with due regard to safety and rights of general public.

3. Automobiles ⇨245(6)
Street railroads ⇨117(5)

In action for injuries to pedestrian on sidewalk struck by automobile colliding with street car, negligence of motorist and motorman *held* for jury.

4. Trial ⇨133(6)

In action for injuries to pedestrian on sidewalk struck by automobile colliding with street car, argument inviting jury to observe conduct of a street car crew when nearing terminus of line, to show that crew on occasion in question were in a hurry, *held* not reversible error, in view of instruction to disregard objectionable statement.

5. Trial ⇨133(6)

Refusal to grant new trial because of reference in argument to defendant street car company as big, rich corporation, where trial court admonished jury to disregard such remark, *held* not error.

6. Appeal and error ⇨978(2)

Where counsel's misconduct is one of grounds urged for new trial, and motion is decided adversely to losing party, trial judge's decision will not be disturbed on appeal except when a plain abuse of discretion is clearly shown.

7. Trial ⇨133(6)

In action for injuries, argument that it was most unfortunate that there were no eyewitnesses other than interested parties, where another witness testified that he saw impact, *held* not reversible error, where jury was promptly advised to rely on the testimony which they heard and were instructed at close of trial to disregard any statement of counsel not supported by evidence.

8. Automobiles ⇨246(15)

In action for injuries to pedestrian struck by automobile owned by father and driven by son with father's consent but not upon his business, instruction that, if jury found verdict against son, they must also find verdict against father, but as to father in sum not greater than $5,000, *held* proper (Civ. Code, § 1714¼).

◆

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Paul K. Alberts against Kenneth Lytle and another and the Los Angeles Railway Corporation. From a judgment for plaintiff, last-named defendant appeals.

Affirmed.

Gibson, Dunn & Crutcher and Philip C. Sterry, all of Los Angeles (E. H. Chapman, of Los Angeles, of counsel), for appellant.

Crail, Shutt, Penprase & Crail, of Los Angeles (Edward A. Penprase, of Los Angeles, of counsel), for respondent.

PACHT, Justice pro tem.

About 1 a. m. of the 15th day of December, 1929, while the plaintiff was standing between a fire plug and a light post on the southwest corner of Vermont avenue and Monroe street in the city of Los Angeles, a collision occurred between a street car owned and operated by the defendant Los Angeles Railway Corporation and an automobile owned by the defendant Earl D. Lytle, and operated by his son, Kenneth Lytle. As a result of this collision, the automobile swerved or skidded onto the sidewalk, struck the plaintiff, and inflicted upon him very serious injuries, for which, upon the verdict of a jury, he was awarded a judgment in the sum of $30,000 against the defendants Los Angeles Railway Corporation and Kenneth Lytle, and $5,000 (the maximum statutory liability) against defendant Earl D. Lytle.

No appeal has been prosecuted by the defendants Lytle, but the defendant Los Angeles Railway Corporation appeals from the judgment, claiming (a) that the evidence was wholly insufficient to sustain a finding of negligence on its part, and for that reason the trial court should have granted its motion for a nonsuit and a directed verdict; (b) that it was prevented from having a fair trial by the alleged inflammatory argument to the jury made by counsel for the plaintiff, and that it was reversible error for the trial court to deny its motion for a mistrial because of certain remarks made by plaintiff's attorney in the course of his summation; (c) that the trial court erred in its instructions to the jury concerning the liability of the defendant Earl D. Lytle; (d) that the giving of certain instructions to the jury requested by plaintiff and the refusal to give certain instructions requested by the defendant Los Angeles Railway Corporation constituted reversible error.

Did the Trial Court Err in Refusing to Grant Appellant's Motion for a Nonsuit and a Directed Verdict?

Inasmuch as appellant challenges the sufficiency of the evidence to support the verdict, we have reviewed the record to determine whether or not, under the established rule, there was sufficient evidence to warrant the trial court in submitting the issue of appellant's negligence to the jury. The transcript discloses the following situation: The plaintiff, twenty-one years of age and a senior at the University of Southern California, was standing on the southwest corner of Vermont avenue and Monroe street waiting for a street car. As noted above, the accident occurred at 1 a. m. of the 15th of December, 1929. "At the scene of the accident, Vermont avenue running north and south is intersected by Monroe street running east and west. However, there is an offset, the western intersection being some 45 feet north of the point where Monroe intersects from the east." At the intersection Vermont avenue is 70 feet wide and Monroe street is 30 feet wide. The street car tracks for north-bound cars on Vermont avenue turn to the west onto Monroe—terminating one block west of Vermont at New Hampshire street. There is no "stop" sign at the northwest corner of Vermont avenue and Monroe or any other sign or signal to warn south-bound automobile traffic on Vermont avenue that the north-bound tracks on Vermont turn west at Monroe. The street car in question was north-bound on Vermont avenue and had stopped at the southeast corner of the intersection to discharge a passenger. After the car had started from the southeast corner, the motorman saw the lights of the automobile being driven by the defendant Kenneth Lytle in a southerly direction. At this time the machine was about 300 feet north of the western intersection of Monroe street, and the motorman testified he could not then gauge the speed at which it was traveling. Thereupon the motorman proceeded to negotiate the turn to the west at the same time that he was observing ("at a glance") the machine coming south. The motorman's course is then best stated by him as follows: "Just before I started onto the curve I observed the automobile was traveling about 30 miles an hour—that was just as I was entering the curve. At that time, when I was just entering the curve the automobile was 175 feet or so north of Monroe street. * * * When I started into the curve I saw the automobile approaching at about 30 miles an hour, at which time it was about 175 feet way. I testified in the case of Sauer v. Los Angeles Railway Corporation, at which time I testified that I started into the curve, and by that time I was within 100 feet of the car." He testified further that after he was in the turn approximately 20 feet, and realizing that the automobile was not slowing down, he applied the emergency brake and brought the street car to a stop within about 20 feet "with the front end of my car about in the center between the second line of Vermont and west curb. Just as I stopped my car the automobile was 6 to 8 feet from the street car coming straight for it, and as I stopped, the automobile swerved and skidded into the front of the street car, knocking off the fender and the left front step, and that threw the automobile around the other way and it skidded into a water hydrant and lamp post on the southwest corner of Monroe," knocking the plaintiff down and causing him the painful and permanent injuries proven upon the trial. Plaintiff was permanently crippled, partially paralyzed, and facially greatly disfigured.

The evidence is in sharp conflict as to whether or not the motorman gave any signal in the way of sounding his gong before entering the turn and as to the speed of the street car while negotiating the curve. The plaintiff and Mrs. Adams, a passenger in the front seat of the automobile, testified that they heard no gong, and the motorman and conductor and at least one other witness for the defendant testified that the motorman and conductor did exchange the usual starting signals when the street car started from the southeast corner. The evidence is likewise in conflict as to whether or not the street car was moving or had been brought to a stop when the two vehicles came into collision. Witnesses for the plaintiff testified that the street car crashed into the automobile and that it was still in motion at the time of the impact. Photographs of the autobile taken after the accident show that the extreme rear left portion of the machine was badly bent and damaged and that the front of the machine remained practically untouched. There was evidence on the part of the defendant Los Angeles Railway Corporation that the street car had come to a stop by the application of the emergency brakes and reverse appliances when the automobile driven by Lytle came into contact with it.

The driver of the automobile, after stating that he was driving south on Vermont avenue, that the streets were a trifle damp due to a light or high fog, that he could see ahead approximately one-half to three-fourths of a block, and that the headlights on his machine were burning, testified as follows: "As I approached Monroe Street I saw the northbound street car. When I first saw it, it was approximately 200 feet south of Monroe Street. I do not recall whether I knew it was in motion or was stationary when I first saw it. The lights were burning on the car. * * * As I approached Monroe Street I was traveling 25 to 30 miles per hour and I was traveling about the same speed as I entered the intersection. * * * I did not see the street car as I entered the intersection of Monroe. The recollection I have of seeing the street car was when it whipped around that turn. I mean by that it did not take the turn very slow. When it started into the turn it came around in a large sweep. At the time I had an opportunity to approximately gauge the speed of the street car as it swung around the turn. It was traveling 12 to 14 miles per hour. The collision occurred about half way between the west curbline of Vermont and the center of Vermont. * * * I do not remember whether the front end of my car was over the south tracks shown on the map or not, but it had passed the north tracks. I have indicated that the largest proportion of my car was past the north car tracks, and that is correct. After the street car hit my car, it threw my car in a sort of semi-circle, throwing the right rear into the lamp post and water plug, and it bounced back toward the center of the right hand side of the street south of both tracks."

Lucy Adams, a witness on behalf of the plaintiff, testified as follows: "I was riding with Kenneth Lytle on the morning of December 15th, 1929, sitting in the right hand front seat of the automobile. No one else was in the car. The street car struck us, struck the left rear portion of the automobile. As we entered the intersection I did not see the street car until it was right on top of us. It was in motion when I first saw it. I looked up, I just saw these lights coming right for us. I looked up and saw the lights and the street car just bearing right down on us, like it was coming—it seemed to come fast and right for us. I am not exactly certain how far away the car was when I observed this, possibly 5 or 6 feet. * * * When I saw this the automobile was over the north car tracks—not completely over but we were advancing into the north car tracks at that time, I believe. I do not think we were completely over the north car tracks. As our car entered the intersection I did not hear any bell or gong or signal of any kind from the street car. There was a fog that night; it was a visible fog, the street seemed to be damp. It was not so thick that you could not see a light. As we approached Monroe Street I should say we were traveling about 20 or 30 miles per hour."

Whether or not the motorman was at the time and place in question and under the circumstances then and there existing guilty of negligence proximately contributing to the accident was, it seems to us, definitely a question of fact to be determined by the jury under appropriate instructions. Appellant argues that its motorman had a perfect right to assume that the automobile was being operated in a careful manner, and that the driver, having seen the street car, would not drive his machine into and across the intersection without taking note of the position and course of the street car; that the motorman had a right to rely on such assumption and to continue to operate his car until something happened which would warn him to the contrary. Arnold v. San Francisco-Oakland Terminal Rys., 175 Cal. 5, 164 P. 798; Billig v. Southern Pac. Co., 192 Cal. 357, 219 P. 992. But whether his conduct on the occasion in question was that of a reasonable and prudent man was a fair question for the determination of the jury. Shipley v. San Diego Electric R. Co., 106 Cal. App. 659, 289 P. 662; Donat v. Dillon, 192 Cal. 426, 221 P. 193.

There is no analogy between the conditions and circumstances existing in the case at bar and those under consideration in Billig v. Southern Pac. Co., 192 Cal. 357, 219 P. 992, a case much relied on by appellant. In the Billig Case the Supreme Court was passing upon the rights and duties of motorists approaching the track of a suburban electric railway and the corresponding rights and obligations of an engineer or motorman of a suburban train being operated along a private right of way.

[1] In the instant case both the automobile and the street car were being operated on well-traveled city streets at a point where a left-hand turn presented some elements of danger. Granting that it is the function and right of street railways to provide rapid transit, it still remains the obligation of its motormen to operate their street cars consistent with ordinary care and at a reasonable rate of speed, taking into account conditions and circumstances as they exist at a given time and place. Arnold v. San Francisco-Oakland Terminal Railways, 175 Cal. 5, 164 P. 798. The District Court of Appeal said in Shipley v. San Diego Elec. R. Co., 106 Cal. App. 659, at page 661, 289 P. 662, 663: "It has been held by a long line of well-considered decisions that the public streets of a city are constructed for the use of all travelers, and that a public service corporation operating street cars has no greater or superior right to use these streets than any other person or persons, with the exceptions, that, as the street car travels upon its tracks from which it cannot turn, other traffic must recognize this fact and govern itself accordingly, and the driver of a motor vehicle must obey the provisions of the California Vehicle Act (St. 1923, p. 517, as amended). The rights and duties of those in charge of a street car are reciprocal with the other users of the public streets." This case cites and applies many other California cases.

[2] As to the plaintiff, both the motorman and the motorist were under the duty of so operating their respective vehicles as to avoid a collision and injuring him. See Aungst v. Central Cal. Traction Co., 115 Cal. App. 116, 1 P.(2d) 56, 57. The court there said: "While street cars must run upon the tracks provided for them, they have no absolute or preeminent right of way over intersections, but must use the same with due regard to the safety and rights of the general public."

[3] It seems to us that the whole situation here presented warranted the jury in finding both the driver of the automobile and the street car negligent. We conclude, therefore, that it was not error for the trial court to deny appellant's motion for a nonsuit and a directed verdict.

Was the Summation of Respondent's Attorney So Inflammatory as to Prevent Appellant from Having a Fair Trial?

That the argument as a whole was not of an inflammatory nature is best demonstrated by the fact that counsel for the appellant found only three occasions for interposing objections, and these we will presently discuss. Had the atmosphere of the trial been charged with a passion or prejudice against the railway company, it would surely have revealed itself in the size of the verdict rendered—yet the amount awarded the plaintiff, considering the serious and permanent nature of his injuries, does not disclose a disposition on the part of the jury to deal unjustly or inconsiderately with appellant's rights in the premises.

[4] We are thus brought to a consideration of the three instances when the remarks of respondent's counsel brought forth specific and timely objection. The first occurred near the end of the opening argument when counsel for respondent, in order to bring to the attention of the jury the fact that the street car crew was on the occasion in question in a hurry to reach the terminus

of the line, and therefore operating the street car in negligent disregard of approaching traffic, said: "Have you ever had the experience of riding on a street car close to the end of the line? If you have not, just notice it the next time—this case will be decided by them—but just watch the activities of the motorman and conductor within about a block or a block and a half or two blocks of the end of the line, and see how much activity there is, and what they do; and observe the manner and method in which the motorman stops and starts his car—"

To these remarks an objection was interposed, a request made to have the jury disregard them, and an assignment of prejudicial error made. Upon examination of the transcript, we find that there was evidence in the record that this was the crew's last run on that particular morning, and that both motorman and conductor had been on duty since 4 p. m. The invitation to the jury to observe the conduct of a street car crew when nearing the terminus of a line upon any occasion other than the one in question was manifestly improper, and the trial judge so advised the jury and instructed them to disregard the objectionable statement.

[5] The second statement urged as reversible misconduct was made in the course of the closing argument. Apparently only the opening and closing arguments of respondent's counsel were reported, and no transcript of the argument made to the jury by appellant's attorney is incorporated in the record on appeal; hence it is quite difficult to determine what, if any, statements of appellant's counsel should have called forth the following remark on the part of the attorney for the plaintiff: "Mr. Penprase: Try everybody but the defendant! Now, Mr. Penprase is on trial! My conduct during the course of the trial does not meet with the approval of this big, rich corporation—" but in any event they were grossly improper. Upon objection being made, the trial court immediately admonished the jury to disregard the remarks and warned counsel to confine himself to a discussion of the evidence. Moreover, when charging the jury, in addition to advising them to consider the case as though the litigants were individuals, without prejudice or passion or sympathy for or against any of the parties, the court specifically admonished the jury as to the matter under immediate consideration in the following pertinent language: "And disregard any statement of counsel that is not supported by the evidence; and in this connection I want to particularly admonish you that you should disregard the statement made by the attorney for the plaintiff in his argument to you as to 'this rich corporation.' In making that statement counsel was carried away undoubtedly by his excitement in the trial of the case. There is no evidence in this case that this is a rich corporation. It may be bankrupt for all you know, or for all I know. This is just an evidence of the fact that you should not consider anything that is unsupported by the evidence in the case; and any statement made by counsel which is not supported by evidence should be entirely disregarded by you."

[6] Whether or not the remark in question affected the jury's judgment in passing on the liability of the railway company or the amount of damages to be awarded was a question which the trial judge was best able, in the exercise of a sound judgment, to determine. The trend of recent decisions seems to definitely indicate that, when counsel's misconduct is one of the grounds urged upon a motion for a new trial, and the motion is decided adversely to the losing party by the trial judge, his decision will not be disturbed on appeal except a plain abuse of discretion is clearly shown. See Aydlott v. Key System Transit Co., 104 Cal. App. 623, 286 P. 456; Lafargue v. United Railroads, 183 Cal. 720, 192 P. 538; Crabbe v. Rhoades, 101 Cal. App. 503, 282 P. 10; Handley v. Lombardi, 122 Cal. App. 22, 9 P.(2d) 867; Perez v. Crocker, 86 Cal. App. 288, 260 P. 838.

[7] The last remark to which exception was taken and which was assigned as misconduct is the concluding sentence of the address of respondent's counsel, reading as follows: "It was a most unfortunate situation that in so far as the plaintiff is concerned there were no eyewitnesses other than the interested parties, that is, the motorman of the street car and the driver of the automobile, Kenneth Lytle." No request was made for the trial court to instruct the jury to disregard the objectionable remark, nor was any motion made to strike the statement; but the court did say, "The jurors heard the testimony," which in effect was a direction to them to be guided only by the testimony which they heard and not by the statement of respondent's attorney. Appellant challenges the accuracy of the remark, claiming that he was in effect telling the jury that three of appellant's witnesses did not see the accident. A reference to the transcript discloses that two of them did not in fact see the impact. A third witness, Ballestra, tes-

tified that he did. The statement of respondent's counsel was, to this extent, inaccurate —unless he meant to assert that Ballestra had testified untruthfully. In any event, the jury was promptly advised to rely on the testimony which they heard, and, in addition thereto, were instructed at the close of the trial "to disregard any statement of counsel that is not supported by the evidence." It seems to us that appellant attaches an importance to the remark of counsel altogether out of proportion to its real significance, and we do not believe that it in any way misguided the jury in their fair and proper deliberations on the case.

Claimed Error in Instructions as to Liability of Defendant Earl D. Lytle.

[8] We find no merit in the contention of appellant that the trial court erred in its instructions to the jury as to the liability of defendant Earl D. Lytle. He was the owner, but not the operator, of the automobile, nor was it being driven on his business. It was, however, being used by his son, Kenneth Lytle, with his knowledge and consent. The trial judge instructed the jury that, in the event they found a verdict against Kenneth Lytle, they must also find a verdict against defendant Earl D. Lytle, but as to the latter in a sum not greater than $5,000. This was strictly in consonance with section 1714¼ of the Civil Code.

Appellant complains that "nowhere were they (the jury) advised that they could return a verdict in favor of both the plaintiff and the defendant, Los Angeles Railway Corporation, and against the defendant Lytle." But we find that seven forms of verdict were given to the jury. In the event they had returned forms of verdict Nos. 3, 4, and 5, the effect would have been a verdict in favor of plaintiff and defendant Los Angeles Railway Corporation and against the defendants Lytle.

Did the Trial Court Err in Its Instructions to the Jury?

Appellant next assigns as reversible error the giving of certain instructions requested by plaintiff and the refusal to give, except as modified, certain instructions requested by defendant; likewise that certain instructions were inconsistent and in conflict with other instructions given at the request of both plaintiff and defendant L. A. Railway Corporation.

We have examined with much care the entire charge to the jury, and find it to be full and comprehensive on every issue litigated in the case and a correct exposition of the law applicable to the evidence introduced; nor do we find any of the instructions given to be inconsistent with, or in conflict with, others so given.

Judgment is affirmed.

We concur: **STEPHENS, P. J.; DESMOND, J.**

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2 Cal.App.2d 99

PEOPLE v. NICHOLS.

Cr. 1823.

District Court of Appeal, First District, Division 2, California.

Nov. 8, 1934.

1. Criminal law ⇨1170(1)

In prosecution for violation of statutes penalizing sex crimes, exclusion of question asked to show that complaining witness was accomplice *held* not prejudicial, where complaining witness' testimony was sufficiently corroborated (Pen. Code, §§ 26, 286, 288, 288a, 1111).

2. Witnesses ⇨344(5)

Evidence that complaining witness, a boy of 13, had stolen some money and left his home, *held* inadmissible for impeachment (Code Civ. Proc. § 2051).

3. Criminal law ⇨714, 1171(1)

Argument of district attorney that jury had no right to say that accused was not guilty because jury in previous trial did not return verdict was improper, where there was no evidence regarding result of former trial, but was not prejudicial misconduct requiring reversal.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Edward Nichols was convicted of violating sections 286, 288, and 288a of the Penal Code, and he appeals.

Affirmed.

Victor Wells, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

SPENCE, Justice.

The defendant was charged in two separate informations, the first alleging a violation of section 288 of the Penal Code and a violation of section 288a of the Penal Code and the second alleging a violation of section 286 of the Penal Code. The cases were consolidated and tried before one jury which found the defendant guilty of all of the charges. From the final judgments of conviction and the order denying his motion for a new trial, defendant appeals.

The complaining witness was a boy of the age of 13 years. His testimony showed that he first met the defendant while occupying a seat next to defendant in a motion picture theater on Market street in San Francisco; that defendant struck up a conversation with him and, while discussing the possibility of getting him a job, defendant placed his overcoat across the boy's lap, and committed a violation of section 288 of the Penal Code; that after the show defendant took him for an automobile ride to San Jose, where defendant took him to an eating place and thereafter to another motion picture show in San Jose, where he again committed a similar violation of said section 288; that on the return trip to San Francisco, defendant stopped his car under some trees and there committed a violation of section 288a of the Penal Code; that about a week later defendant drove to a point near the boy's home, picked the boy up and took him to defendant's home, where he committed a violation of said section 288 on a couch in the front room and also committed a violation of said section 288a on the bed in the bedroom; that about a week later defendant again met the boy, took him to defendant's home, and there, upon a bed committed a violation of section 286 of the Penal Code.

The boy was subsequently picked up by the police at about 2:30 in the morning and finally related his story in detail concerning said offenses. He was given a medical examination, and it was found that sodomy had been practiced upon him. When the police went to defendant's home, defendant admitted that he knew the boy, that he had taken him out, and that he had given him money. Defendant further stated to the police that he knew the boy's father very well, that he was an old friend of the family and had worked with the boy's father on some C. W. A. project. Upon the trial, the father testified that he had never seen the defendant before seeing him in the courtroom, and he denied working with him at any time. Although the defendant took the witness stand, we find no denial of this testimony of the father. In fact, the defendant substantially corroborated all of the boy's story as given to the police and as given on the witness stand except that he denied the criminal acts. By way of impeachment of defendant's testimony, it was shown that he had been previously convicted of a felony. It may also be stated that defendant admitted giving the boy presents on said occasions consisting of money, a mechanical drafting set and a baseball.

[1] Appellant first contends that the trial court erred in sustaining an objection to a question asked of the complaining witness on cross-examination by which appellant sought to show that the boy "had knowledge of the wrongfulness of the acts which he testified were committed." It is appellant's theory that the ruling was prejudicial, as he was seeking to show that the boy, although under 14 years of age, was capable of committing crime (section 26, Pen. Code), and was therefore an accomplice. While it is clear that the boy could not be an accomplice in a violation of said section 288 committed upon himself (People v. Troutman, 187 Cal. 313, 201 P. 928; People v. Hulbart, 55 Cal. App. 112, 202 P. 939), it is not so certain that he could not be an accomplice in a violation of said section 288a or a violation of said section 286 so committed. See People v. Johnson, 115 Cal. App. 704, 2 P.(2d) 216, and People v. McCollum, 214 Cal. 601, 7 P.(2d) 301. We do not deem it necessary, however, to discuss this question, as we believe that any alleged error in the exclusion of said testimony was not prejudicial, as the testimony of the boy was sufficiently corroborated. The admitted actions of the appellant with a boy previously unknown to him, together with his false statements to the officers, could not be reasonably construed as the acts of an innocent man and in our opinion this evidence was sufficient to "tend to connect the defendant" with the commission of the offenses. Section 1111, Pen. Code; 8 Cal. Jur., pp. 178–181, §§ 256 and 257.

[2] Appellant further contends that the trial court erred in sustaining the prosecution's objection to evidence regarding the whereabouts of the boy after he made his statements to the police, "which testimony would have tended to establish the dishonesty and untruthfulness" of the boy. The specific question to which the objection was sustained was "Where did you live, Irving, after the preliminary hearing and before the first trial of this case?" We find no error in the ruling sustaining the objection. It is apparently ap-

pellant's theory that he was entitled to show that the boy had stolen some money and left his home during that time and that the boy's testimony could be impeached by such showing. It is a sufficient answer to point out that the boy's testimony could not be impeached merely by showing other wrongful acts. Code Civ. Proc. § 2051.

[3] Appellant also charges misconduct on the part of the district attorney in his argument to the jury. This charge is based on the following statement of the district attorney: "And, of course, right away he went to the transcript of the testimony of the last trial. And there is another thing; you have no right to say, 'Well, the jury did not return a verdict in the last trial, therefore we won't,' or 'therefore he must be not guilty.' Just because some juror or jurors in that case made a mistake, is no sign that you should make a mistake." It appears from the transcript that numerous references were made to the former trial of the case, but we find no evidence regarding the result of such former trial. The foregoing statement of the district attorney was therefore improper, but we do not believe that the making of said statement constituted prejudicial misconduct requiring a reversal.

The judgments and order denying the motion for a new trial are, and each of them is, affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

2 Cal.App.2d 134

GAUMNITZ v. INDEMNITY INS. CO. OF NORTH AMERICA.

Civ. 5140.

District Court of Appeal, Third District, California.
Nov. 9, 1934.

1. Insurance 🔑452

Light pickup cab with maximum capacity of 1,000 pounds and used by mechanic to transport tools or light loads, or for family pleasure, *held* not a "truck" so as to defeat liability under policy exempting insurer from liability for injury or death resulting from accident while riding in an automobile truck.

A "truck," as that term is employed in exemption clause of accident policy, refers to an automobile designed to carry heavy inanimate loads of produce or materials as distinguished from a "pickup cab," which is constructed and intended to convey only light loads.

[Ed. Note.—For other definitions of "Truck," see Words & Phrases.]

2. Evidence 🔑16

It is common knowledge that an automobile constructed with closed cab and light pickup body mounted on passenger chassis is not referred to as a truck.

3. Evidence 🔑539

Where issue was whether insured was killed while riding in truck, in which case no liability attached to insurer, automobile agents with several years' experience in selling Ford machines *held* qualified to testify regarding construction of machine in which insured was riding and the heavier construction of an automobile truck.

4. Appeal and error 🔑971(2)
Evidence 🔑546

Determination of qualifications of witnesses is largely within discretion of trial court whose discretion will not be interfered with in absence of clear showing of abuse thereof.

5. Trial 🔑133(6)

Remarks that insurer was trying to "chisel plaintiff out of her money," that policy was issued with reference to particular automobile in which insured was killed, and that attorney knew that plaintiff "was right" in her contention, although improper, *held* not reversible error, where court instructed jury to disregard remarks, and evidence was such that jury could have returned no other verdict.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by Gayle Whittaker Gaumnitz against the Indemnity Insurance Company of North America. Judgment for plaintiff, and defendant appeals.

Affirmed.

Sutherland, Dearing & Jertberg, of Fresno, for appellant.

Conley, Conley & Conley, of Fresno, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment of $1,607.92, which was rendered pursuant to the verdict of a jury returned in a suit on an insurance policy on account of the death of plaintiff's husband as the result of an automobile casualty. The indemnity company claims it is specifically exempted from liability by the terms of the policy for the reason that the insured was killed while riding in a truck. It is also asserted the court erred in admitting expert testimony as to the classification of the machine, and that plaintiff's attorney was guilty of prejudicial misconduct in the course of his argument to the jury.

The plaintiff was the wife of E. B. Whittaker, who was insured by the defendant in the sum of $1,500 against injury or death "(A) While operating, riding in, demonstrating, adjusting or cranking an automobile." He was the owner of a light Ford pickup machine, in which he was riding on August 10, 1932, when he was killed as the result of a collision. The policy, which was then in full force, contains the following exemption clause, "This policy shall not cover injuries (fatal or otherwise) or any loss or disablement sustained: * * * (6) while operating, riding in or on, demonstrating, adjusting or cranking any * * * automobile *truck*. * * *"

Demand for the payment of the policy was duly made and refused. A suit on the policy was then commenced. It was tried with a jury which returned a verdict for the amount of the policy and interest thereon in favor of the plaintiff. A motion for a directed verdict was denied. Judgment was rendered pursuant to the verdict. From that judgment the defendant has appealed.

[1, 2] The record contains competent satisfactory evidence that the machine in which Whittaker was riding at the time of his death was a light Ford pickup automobile, and that it was not an "automobile truck" as that term is used in the exclusion clause of the policy. Several photographs of the machine were admitted in evidence without objection. A prospectus containing pictures of the various types of automobiles which are manufactured by the Henry Ford industry was also received in evidence without objection. The illustration contained in the pamphlet, corresponding with the machine which is involved in this case, is called a "Ford pickup open cab." A number of automobile agents, with several years of experience in selling Ford machines, testified regarding the construction and classification of a Ford pickup cab as distinguished from an automobile truck, as those terms are known to the trade. Several witnesses said the machine in question was a Ford pickup cab and on the contrary that it was not an automobile truck.

Mr. Short, who was called as a witness by the defendant, testified in that regard: "It is a '29 closed cab, steel body, with a steel pickup body on behind it. * * * (It is) listed here (on the Ford advertising pamphlet) as a pickup closed cab."

Mr. Rhine testified:

"It is not a truck. * * * It was designed for a light pickup. * * * The maximum capacity which the car was designed to carry (is) one thousand pounds. * * * The pickup has the same chassis, same tires, same everything but the body that a pleasure car has. * * * Because the manufacturer does not list it as a truck, it is never sold as a truck. * * * The chassis of this car was the same as that of a 'A' Ford passenger car.

"Q. And is that true of the tires also? A. Yes sir.

"Q. How does the truck differ from that type of car with regard to construction, generally speaking, is it heavier construction? A. Yes sir."

Mr. Gordon testified that that particular car was not equipped with "commercial springs," with which another witness had said that heavier machines were supplied. He said this machine was used to convey a mechanic's tools to and from his work, and for pleasure and general family use. Mr. Lewis testified that it was used to convey from a farm "different little things." He said it was intended for "light delivery." It is almost common knowledge that a light machine of that nature is used as a convenient means of business transportation for the owner and to convey tools, and small light equipment and packages. It is common knowledge that no one refers to a machine of that type as a "truck." There is no substantial evidence to the contrary.

A truck, as that term is employed in the exemption clause of the policy, evidently refers to an automobile designed to carry heavy inanimate loads of produce or materials as distinguished from a "pickup cab," which is constructed and intended to convey only light loads. The New Universities Dictionary of 1927 defines a truck as "A heavy automobile on solid tires built to carry a load of from three to ten tons." In the case of Paltani v. Sentinal Life Ins. Co., 121 Neb. 447, 237 N. W. 392, the term "truck" is defined as "a wheeled vehicle for carrying heavy weight; an automobile for transporting heavy loads."

In construing a statute providing for license fees to be paid for operating motor vehicles, it was said in Hemlock 6400 Tire Co. v. McLemore, 151 Tenn. 99, 268 S. W. 116, that a truck, as distinguished from a Ford machine with wagon-shaped box which was used to carry tools and light articles, was a "heavy, slow-moving, freight vehicle causing heavy road wear," and used for transporting merchandise and other heavy articles. Certainly a light Ford pickup cab, with a maximum capacity of only 1,000 pounds which is used by an electrician or mechanic to transport the light tools with which he is employed, or which is used to convey light loads, or for family convenience or pleasure, may not be said to be an "automobile truck," so as to defeat a liability under the provisions of an insurance policy indemnifying against injury or death resulting from an accident while riding in an automobile.

[3, 4] We are of the opinion the court did not err in receiving expert testimony regarding the construction of the machine in question and the heavier construction of an automobile truck. The determination of the qualifications entitling these witnesses to explain the character of the construction of a Ford pickup cab as distinguished from an automobile truck was largely in the discretion of the court, and the exercise of that discretion will not be interfered with in the absence of a clear showing of an abuse thereof. The rule is well established that a mechanic who is familiar with a certain machine may testify regarding the construction or operation of the device. On the same principle, an automobile salesman who is familiar with the construction of a particular type of machine may testify to such facts regarding the construction as are within his knowledge. Such an expert salesman may also testify from his knowledge of the difference in construction between a light machine and a truck, and from his knowledge of the appearance and the difference between the construction of a pickup cab and a truck, as these types of machines are known to the trade, that a certain machine is a pickup cab and that, on the contrary, it is not a truck. If the difference between a pickup cab and a truck is within the common knowledge of all, then there was no harm in admitting this expert evidence. If it is not common knowledge, then expert evidence on that subject is competent. We have no doubt it is proper to admit expert evidence to identify a particular type of automobile as it is known to the trade. It is competent for an expert witness to identify a particular automobile as a sedan, coupé, pickup, or truck from his knowledge of its construction and appearance, just as it is competent, in a suit for breach of contract, to introduce expert evidence to distinguish the Tokay from the Mission variety of grapes, or the Holstein from the Jersey breed of cattle. There was no error in permitting expert witnesses to testify that the automobile in question was not a truck.

[5] The prejudicial statements of plaintiff's attorney which were made in the course of his argument to the jury do not constitute reversible error for the reasons that the court instructed the jury to disregard them and because the only real issue in the case is whether the automobile in question is a truck and the implied finding of the jury on that issue is in accord with the only sensible manner in which it could have been determined under the evidence. We are therefore thoroughly satisfied that there was no miscarriage of justice in this case.

Three separate statements of plaintiff's attorney were assigned as prejudicial. The first one in effect charged the defendant with being a wealthy insurance company which was trying to "chisel the plaintiff out of her money." The second one assumed that the policy was issued with reference to the particular machine in which Whittaker was riding at the time of the accident which resulted in his death, the character of which machine was known to the company; that the company insured the deceased against injury or death while riding in his Ford pickup cab, and after his death attempted to escape liability by calling it a truck. The third statement was a declaration that counsel knew the plaintiff "was right" in her contention, and he then reiterated his assertion that the company was "attempting to chisel her out of her money."

Following each of these challenged statements, at the request of counsel for the defendant, the court, in effect, charged the jury to disregard them. It is contended the court did not directly do so. The language of the court is not as explicit as it might have been, but we are certain the jury must have understood the court to charge them to disregard these particular statements. The admonition regarding the first statement was made in the following language: "As to whether or not any payment had been made on the policy, why, you are not to consider it at all, it is not proper for your consideration, so you will disabuse it from your mind." Regarding the second statement, the court said: "The jury will abide by the evidence in the case and remember that arguments of counsel are not evidence." The charge of the court following the third statement was in this language: "The jury is instructed to disregard the remark and decide the case on the evidence here that is in the record." And finally the court said: "The jury is instructed to disregard the passionate remarks of counsel on either side and decide this case solely and exclusively on the law and the evidence. Of course, if juries don't do it, it will be the duty of the court to set your verdict aside." These admonitions were directed toward the defendant's specific assignments of prejudicial statements on the part of plaintiff's attorney, and clearly infer that the court deemed them to be improper and directed the jury to disregard them.

With the well-known antipathy of jurors toward insurance companies, these unwarranted statements should not have been made. They indicate an excess of zeal and indiscretion on the part of counsel. But, in view of the fact that we assume the jury could have justly returned no other verdict which would accord with the evidence, we are of the opinion these statements do not constitute reversible error.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

* * *

2 Cal.App.2d 29

VON GAL-SCALE et al. v. COTTRELL et al.

Civ. 1492.

District Court of Appeal, Fourth District, California.

Nov. 5, 1934.

1. Mines and minerals 🔑26

Where original location of placer mining claim was made on August 30, 1925, attempted relocation on November 16, 1925, was void because made before expiration of time in which original locators could do assessment work (Civ. Code, § 1426m).

2. Mines and minerals 🔑26

Statute giving 30 days after statutory year for filing of affidavit showing that assessment work on mining claim was done within year of locating claim *held* not to extend time for doing of work so as to prevent new location during 30-day period where assessment work had not been done (Civ. Code, § 1426m).

3. Appeal and error 🔑909(2)

In action to quiet title to mining claim, where evidence showed that defendants made new location within 30 days after time for doing assessment work on original location expired, it would be presumed in support of judgment for defendants that assessment work on original location had not been done so as to permit filing of affidavit within 30-day period (Civ. Code, § 1426m).

4. Appeal and error 🔑880(3)

In action to quiet title, plaintiffs who had no interest in property could not attack judgment in favor of one of defendants upon grounds which might have been raised by defaulting defendants.

◆

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Dr. J. Von Gal-Scale and others against J. P. Cottrell and others, in which the named defendant filed a cross-complaint. From an adverse judgment, plaintiffs appeal.

Affirmed.

Eugene L. Wolver, of Los Angeles, for appellants.

Emery B. Tyler, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

This is an action to quiet title involving certain mining claims. All prior and subsequent locators were made parties defendant, and all defaulted with the exception of the respondent, who answered and filed a cross-complaint asking that title be quieted in him as to one of the parcels described in the complaint. Judgment was entered quieting title to the one parcel in the respondent and in favor of the appellants as to the other parcels. The latter have appealed from that portion of the judgment which was in favor of the former.

The appeal is presented on a bill of exceptions containing only a meager statement of the evidence. With reference to the parcel of land which is involved in this appeal, the appellants introduced evidence of two recorded placer mining claims located on November 16, 1925, with evidence that subsequent annual assessment work had been done. The respondent introduced evidence showing that a mining claim had been located on the property by others on August 30, 1925; there being no proof that any assessment work had been done in connection with said claim. In support of his cross-complaint, the respondent introduced the record of a third mining claim located on July 1, 1927, by certain other persons whose rights had been assigned to him, and evidence that the assessment work had been done.

[1-4] The original location having been made on August 30, 1925, the appellants' attempted location of November 16, 1925, was made long before the expiration of the time during which the original locators might do the assessment work, and such location was premature and void. Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735.

The main contention of the appellants is that the location on July 1, 1927, under which the respondent claims, was also premature. In this connection it is argued that, while the time within which the original locators could do the assessment work expired at noon on July 1, 1927, they had an additional thirty days, under section 1426m of the Civil Code, within which to record an affidavit showing that the work had been done, and that during this additional period the land was not open to relocation. In support of this they cite Harris v. Kellogg, 117 Cal. 484, 49 P. 708, and Jones v. Peck, 63 Cal. App. 397, 218 P. 1030. Those were cases where the assessment work had been done before the statutory year had expired, and neither of those cases is authority for the proposition that this Code section gives an additional thirty days in which the work may be done, or that a new location cannot be made during that thirty-day period where, in fact, the assessment work has not been completed within the statutory year. If the respondent's assignors located their claim upon this property after 12 o'clock noon on July 1, 1927, and it must be presumed in support of the judgment that such was the case, the respondent's claim is based upon a valid location. Rasmussen v. Sullivan, 119 Cal. App. 539, 6 P.(2d) 985.

In any event, the appellants are in no position to urge this and several other points raised, since the location of November 16, 1925, under which they claim, was made long before the period allowed the original locators for doing the assessment work had elapsed and at a time when, under well-settled rules, the property was not open to relocation. Having no interest in the property themselves, the appellants are in no position to attack the judgment in favor of the respondent upon grounds which perhaps might have been, but were not, raised by some of the defaulting defendants, who were the real parties affected thereby.

A motion made by appellants and heretofore submitted, by which it was sought to have the originals of the exhibits mentioned in the bill of exceptions brought up and made a part of the record, is denied.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

2 Cal.App.2d 214

LYNCH v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al. (UNION BANK & TRUST CO. OF LOS ANGELES et al., Interveners).

Civ. 5040.

District Court of Appeal, Third District, California.

Nov. 13, 1934.

Hearing Denied by Supreme Court Jan. 10, 1935.

1. Trusts 🔑153

Trustor's interest in trust fund, represented by his fees and compensation for services in promoting realty enterprise, *held* assignable.

2. Contracts 🔑164

Separate written documents between same parties and relating to same subject-matter as indicated by language contained therein, or satisfactorily proved by circumstances under which they were executed, are to be construed as one transaction, notwithstanding documents were not executed on same date (Civ. Code, § 1642).

3. Trusts 🔑117

In action by trustee in bankruptcy to recover commissions allegedly due to bankrupt under trust for sale of realty, trust agreement by which compensation was made payable and contract whereby bankrupt had agreed that such payments should be deferred until in trustee's opinion such payments were financially feasible *held* properly admitted as parts of same transaction, where deferment contract specifically referred to declaration of trust and the two instruments were specifically accepted and adopted by trustee at same time as parts of same transaction (Civ. Code, § 1642).

Appeal from Superior Court, City & County of Los Angeles; Edward T. Bishop, Judge.

Action by E. A. Lynch, as trustee in bankruptcy of the estate of E. G. Lewis, a bankrupt, against the Bank of America National Trust & Savings Association, a corporation, and others, wherein the Union Bank & Trust Company of Los Angeles, a corporation, and others, intervened, and wherein H. W. Force and others filed cross-complaints. From a portion of a judgment, plaintiffs and the cross-complainants appeal.

Affirmed.

Joseph L. Lewinson and Benjamin S. Crow, both of Los Angeles, for E. A. Lynch, Trustee in Bankruptcy of Lewis' Estate.

Woodruff, Musick & Hartke and George Martinson, all of Los Angeles, Louis Ferrari, of San Francisco, and Edmund Nelson, of Los Angeles, for Bank of America National Trust & Savings Ass'n.

Pillsbury, Madison & Sutro, of San Francisco, for H. W. Force and others.

Woodruff, Musick & Hartke, of Los Angeles, for Bank of America Nat. Trust & Savings Ass'n and Union Bank & Trust Co. of Los Angeles.

Woodruff, Musick & Hartke, of Los Angeles, for C. A. Compton and H. T. Cory.

Paul E. Younkin, of Los Angeles, for Frank James.

Gibson, Dunn & Crutcher, of Los Angeles, for H. W. Kindig and W. J. Niederer.

Norman T. Mason, of Los Angeles, for P. H. Cullen, Thomas Flauntleroy and others.

Oscar L. Willett, of Los Angeles, in pro. per.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The plaintiff has appealed from that portion of a judgment which declares and enforces an indenture of trust involving the subdivision and sale of real property. This challenged portion of the judgment determines that a separate written instrument which was accepted, adopted, and ratified by the trustee at the same time and as a part of the declaration of trust should be construed with it and has the effect of deferring the payment of certain fees and commissions belonging to E. G. Lewis, the trustor, according to the terms thereof. This contract is dated February 17, 1923, and the court found that it provides in part: "The fees and compensation of the said E. G. Lewis under the said Commonwealth Trust Company indenture, if the same should be accepted by the Commonwealth Trust Company, should be deferred until such time as in the opinion of the said Commonwealth Trust Company said payment can be made without interfering with the successful carrying out of the project."

The appellant asserts this written agreement, which is the sole subject of controversy on this appeal, is a separate contract which was executed previous to the adoption of the declaration of trust, that it is in conflict with the provisions of the trust, and that the court erred in receiving oral evidence with respect to that separate instrument.

On the contrary, the respondents contend that this agreement to defer the payment of fees and commissions was adopted at the same time and as a part of the original declaration of trust between E. G. Lewis, trustor, and the Commonwealth Trust Company, trustee, as shown by the written resolution of that trust company passed February 19, 1923, that these two instruments should be construed together, and that the rule with reference to the varying of a written instrument by parol evidence is not involved in this case.

This suit was instituted by the trustee in bankruptcy of the estate of E. G. Lewis, primarily to declare that the bankrupt has an interest in the funds of a trust enterprise which was created for the purpose of subdividing and selling real property. The complaint also asked for an accounting. The separate written agreement which purports to defer the payment of the fees and commissions due to E. G. Lewis, and which modifies the trust agreement with relation to the time of such payments, was set up in the answer of the Bank of Italy National Trust & Savings Association (now the Bank of America National Trust & Savings Association), as a special defense. The pleadings are complicated. The court adopted findings declaring the validity of the trust agreement and determining the interest of Lewis in the funds therein, but held that the separate written contract in question should be construed as a part of the trust and that it has the effect of deferring the payment of the Lewis funds as provided therein. This appeal is presented by means of a bill of exceptions which is confined to the proceedings and evidence applicable to the question of the validity and effect of the deferment contract alone.

August 23, 1921, E. G. Lewis held an option for the purchase of 16,000 acres of lot H of the Rancho Palos Verdes of Los Angeles county for the sum of $5,000,000. December 16, 1922, E. G. Lewis, as trustor, and Title Insurance & Trust Company, as trustee, executed an elaborate written declaration of trust, providing for the conditional purchase of the 16,000-acre tract of land for $5,000,000, together with a plan for subdivision and resale of the property and the marketing of shares in the enterprise represented by promissory notes. The declaration of trust also provided for payment to the trustor of a specified percentage of the proceeds of sales and authorized a termination of the trust at the option of the trustee for failure of the enterprise within a specified period of time. The project contemplated the raising of $15,000,000. Shares were sold in the aggregate sum of approximately $5,000,000. The trust, however, failed and the Title Insurance & Trust Company terminated the trust in the manner provided by the contract and reassigned its interest to Lewis, who had been paid no part of the fees or commissions due to him.

February 17, 1923, Lewis executed the written agreement with the Commonwealth Trust Company, which is the subject of this appeal, agreeing to defer the payment of his fees and commissions in consideration of the last-mentioned trust company accepting and becoming a party to a trust agreement similar to the original one above mentioned, except that the proposed new agreement was to cover a different real estate enterprise involving only 3,200 acres of the Rancho Palos Verdes, to be purchased for the sum of $1,000,000. This deferment contract, which is here involved, reads in part:

"Whereas, first party (Lewis) under said trust indenture is entitled to certain fees and compensations, as set out therein in the event that the carrying out of said project is undertaken by the said trustee; and

"Whereas, said trustee is now about to decide whether or not to undertake the carrying out of said project, and whether or not sufficient subscriptions and/or funds are in its hands to warrant it in proceeding with said project; and

"Whereas, the trustee deems it to be absolutely essential to the successful carrying out of the enterprise that the payment of all the fees and compensations of the first party be deferred until such time as in the opinion of the said trustee said payment can be made without interfering with the successful carrying out of the project:

"Now, therefore, the parties hereto agree as follows:

"(1) The first party agrees that in consideration of the trustee undertaking to carry out said project that the payment in cash of all of the fees, compensation and deferred interest payments which may become due and payable to the first party under the terms of said trust indenture shall be deferred until such time as in the sole judgment of the trustee there shall be funds sufficient and ample in the possession of the trustee under said trust to warrant it in making such payment, or portions thereof, from time to time. * * *

"(2) The second party agrees that if it finally determines that as trustee under said trust indenture to proceed with said project, it will in consideration of this agreement, proceed with the said undertaking, but it is expressly agreed, and the trustee hereby expressly declares that it does not deem that there is now sufficient cash in hand to permit it to proceed, except by the use in the carrying out of the general project of the cash made available to it for such use under this agreement. * * *

"E. G. Lewis, First Party.
"Commonwealth Trust Company,
"By Jay Lawyer, President.
"By H. E. Benedict, Secretary."

At a regular meeting of the board of directors of the Commonwealth Trust Company, a corporation, held on February 19, 1923, the preceding agreement was accepted and adopted as a condition precedent to the trust company becoming a party to the proposed real estate enterprise involved in the trust last mentioned. It was accepted, ratified, and executed by the corporation on the last-mentioned date. The trust agreement was then executed at the same time and as a part of the same transaction. Thereafter E. G. Lewis secured a separate option to purchase 3,200 acres of the Rancho Palos Verdes for the sum of $1,000,000. This option was subsequently assigned to the Commonwealth Trust Company, and exercised on March 2, 1923. The declaration of trust which was executed February 19, 1923, between E. G. Lewis, as trustor, and Commonwealth Trust Company, as trustee, involving the 3,200-acre tract of the Rancho Palos Verdes, is separate and distinct from the original trust agreement with the Title Insurance & Trust Company involving 16,000 acres of that same tract, but the declaration of trust with the Commonwealth Trust Company was in the same form and language which was employed in the original agreement, except that it involves only 3,200 acres of the original tract which was secured by a subsequent option for the purchase thereof, and except that it is modified by the agreement which is involved in this suit. As a matter of convenience many subscribers to the original enterprise resubscribed with the present Commonwealth Trust Company project. That method of transferring the interests of subscribers is immaterial to the solution of this case. January 5, 1925, E. G. Lewis was declared a bankrupt. This suit was instituted by the trustee of the bankrupt estate of E. G. Lewis to establish the trust agreement with the Commonwealth Trust Company, and to determine the bankrupt's interest in the funds thereof. The court adopted findings declaring the validity of that trust and determining the interest of the bankrupt in the funds thereof. These findings are not challenged. But the court also found that the "deferment agreement," heretofore quoted in part, was duly executed by E. G. Lewis and the Commonwealth Trust Company, and "that the Commonwealth Trust Company accepted its said trust in reliance upon the terms of the said deferment agreement and would not have accepted said trust except for the execution of said agreement," and "that the said deferment agreement is in full force and effect and binding upon the parties thereto." It was then found there were insufficient funds in the trust enterprise to warrant the present payment of the fees and compensation due to Lewis or his assignees, and that their compensation from that source is subject to the terms and conditions of the said deferment contract. Judgment was rendered accordingly. From this portion of the judgment an appeal was perfected.

It is true that the original declaration of trust with the Title Insurance & Trust Company did provide for payment to Lewis, the trustor, of "five per cent of the principal amount of all registered subscriptions and cash proceeds from sales and leases of trust real property, * * * when the trustee is in a financial position to exercise the said option." It is true, according to the original trust indenture, that other payments were to be made to Lewis from the proceeds derived from that enterprise. And it is true the trust instrument also provides: "This trust indenture may be amended, changed or added to at any time and in any respect and as to the effect of the whole, or any part hereof, by and with the consent in writing of: (1) The Trustee; (2) The first party; and (3) The owners of fifty-one per cent of the principal amount of all outstanding registered notes and registered subscriptions."

The deferment agreement, which is the subject of controversy on this appeal, does change the time and manner of paying to E. G. Lewis his fees and commissions as provided by the terms of the former trust indenture. But the court found, and that fact is not disputed on this appeal, that the original declaration of trust with the Title Insurance & Trust Company was terminated. Neither the makers of notes nor the subscribers to that original enterprise, as such, were interested in the new declaration of trust which was subsequently executed with the Commonwealth Trust Company. It does appear that some of the original makers of notes and subscribers of the first enterprise did subsequently renew their subscriptions in the new project. That, however, constituted a different transaction. These renewals of subscriptions do not affect the terms of the present trust. So far as the record in this case is concerned, this trust is separate and distinct from the original Title Insurance & Trust Company transaction, and the resubscriptions to the new project were not made upon any terms or conditions which affect this appeal. The original trust company was not converted into the present organization. In view of the fact that the original trust agreement with the Title Insurance & Trust Company is not the contract which controls the present enterprise, the amendment of that instrument is not involved in this case. According to the findings of the court the form of that original declaration of trust was merely used by the parties to this trust as a pattern for a new and distinct organization. In no sense which becomes binding on the present enterprise were the provisions of the original trust instrument amended. The method of amending that document as provided by its terms was therefore immaterial. The court found that what did occur was that the new enterprise adopted a different declaration of trust following the form of the original instrument modified by a change with respect to the acreage and with respect to the description of the real estate involved, and by making certain other changes which are not involved on this appeal. It also found that the separate written deferment contract which was prepared and signed by E. G. Lewis, the trustor, on February 17, 1923, was accepted, adopted, and ratified by the Commonwealth Trust Company, as trustee, two days later, at the same time and as a part of the final declaration of trust which is controlling in this case. These findings are in accordance with the judgment. The judgment and findings are amply supported by the evidence in that respect.

Regarding the fact that the challenged deferment contract was adopted by the Commonwealth Trust Company at the same time and as a part of the final declaration of trust which controls the enterprise involved in this suit, the bill of exceptions discloses a memorandum of the resolutions of that corporation which were adopted at a regular meeting of the trustees thereof, at a meeting of the board held on February 19, 1923. The minutes of that meeting show that a copy of the original trust indenture previously adopted by the Title Insurance & Trust Company, together with certain amendments thereto, were presented and read to the directors. The minutes then recite that, "The Secretary then presented and read to the Board a certain agreement between Mr. E. G. Lewis, as first party, and Commonwealth Trust Company, a corporation, as second party, dated February 17, 1923, duly executed by said E. G. Lewis and by said Commonwealth Trust Company by Jay Lawyer, President, and H. E. Benedict, Secretary," which is the same deferment contract heretofore quoted, and which is the subject of this controversy. The minutes of that board then certify that: "I, H. E. Benedict, Secretary of the Commonwealth Trust Company, do hereby certify that the annexed Trust Indenture Palos Verdes Project, marked as Exhibit 'A,' and the annexed amendments to said Trust Indenture marked Exhibit 'B,' and the annexed Renewal of Subscriptions and Trust Indenture, marked Exhibit 'C,' are full, true and correct copies of the original documents * * * as the same were on the 19th day of February, 1923, formally adopted by the Commonwealth Trust Company of Los Angeles, under and by virtue of a resolution duly enacted."

The trust agreement was then accepted and adopted by the Commonwealth Trust Company, together with the amendments thereto, including the "deferment agreement" in controversy, as one declaration of trust, as shown by the resolution of the board, as follows: "Be It Resolved: That Commonwealth Trust Company does hereby accept the said Trust as contained in the original Trust Indenture *and as modified in the amendments* hereinbefore recited and the renewal or subscriptions hereinbefore set forth and referred to, and does hereby agree to act as Trustee in accepting renewals of subscriptions and new subscriptions under said trust indenture, *as amended and modified*, and *in accepting, receiving and disbursing monies paid in thereunder* and under orders of transfer to the Title Insurance and Trust Company."

[1] There is no doubt that the interest of E. G. Lewis in the trust fund, represented by his fees and compensation for services in promoting the real estate enterprise, was assignable and that it was validly conveyed to his assignees. Title Ins. & Trust Co. v. Duffill, 191 Cal. 629, 649, 218 P. 14; Bridge v. Kedon, 163 Cal. 493, 500, 126 P. 149, 43 L. R. A. (N. S.) 404; 5 C. J. 854, § 17; 3 Cal. Jur. 236, § 3. This fact is not controverted.

The deferment contract was clearly executed and accepted by the contracting parties as a part of the declaration of trust. The language of these instruments indicates that they were intended to become a part of the same transaction. Section 1642 of the Civil Code provides in that regard: "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."

[2] The rule that separate written documents between the same parties and relating to the same subject-matter as indicated by the language contained therein, or satisfactorily proved by the circumstances under which they were executed, are to be construed together as one transaction, has been determined by so many authorities there is no room for controversy regarding that principle. Burleson v. N. W. Mutual Ins. Co., 86 Cal. 342, 24 P. 1064; Hawes v. Lux, 111 Cal. App. 21, 294 P. 1080; 6 Cal. Jur. 298, § 181; 13 C. J. 528, § 487; 6 R. C. L. 850, § 240. This rule applies even though the separate written instruments were not executed on the same date.

[3] The deferment contract which is involved in this appeal specifically refers to the declaration of trust and thereby clearly indicates that the two instruments were to be construed as a part of the same transaction. These two instruments were specifically accepted and adopted by the Commonwealth Trust Company at the same time as parts of the same transaction. They were properly admitted in evidence and construed by the trial court as parts of the same transaction.

A separate appeal was perfected by the defendants and cross-complainants H. W. Force, J. R. Gwynn, W. S. Bliss, E. C. Pitcher, H. F. Stewart, Frederick Johnson, and E. L. Elberg, from the same portion of the judgment from which the plaintiff appealed. This appeal is presented on the same bill of exceptions and is submitted on the same briefs which were filed in behalf of the plaintiff. It is determined in the same manner and for the same reasons heretofore stated with relation to the plaintiff's appeal.

The portion of the judgment separately appealed from by the plaintiff and by the defendants and cross-complainants is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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2 Cal.App.2d 224

FINDLAY v. COYLE.

Civ. 9166.

District Court of Appeal, First District, Division 1, California.

Nov. 14, 1934.

1. **Executors and administrators** 🔑221(4)
In action by nurse to recover from estate amount of mortgage assumed by her in pursuance of agreement by decedent to pay off mortgage if she would purchase house and take care of him during his declining years, evidence justified verdict for plaintiff.

2. **Executors and administrators** 🔑202(1)
In action by nurse against decedent's estate for amount of mortgage agreed to be paid by decedent in return for her services, that she approved accounts charging her with interest on mortgage, thereby making them her own, did not bar recovery, where nurse reposed complete confidence in decedent, she was of very limited business ability, and stated that she thought everything was all right.

3. **Executors and administrators** 🔑202(1)
That nurse, having no independent income, and dependent on daily labor for living, assumed mortgage on house at request of decedent who wished home and care, *held* sufficient consideration for decedent's agreement to pay off mortgage (Civ. Code, § 1605).

Appeal from Superior Court, San Francisco County; Franklin A. Griffin, Judge.

Action by Anne Findlay against Angela J. Coyle, as administratrix of the estate of Joseph A. Coyle, deceased. Judgment for plaintiff, and defendant appeals.

Affirmed.

Andrew F. Burke, of San Francisco, for appellant.

Dunne, Dunne & Cook and John Elliott Cook, all of San Francisco, for respondent.

JAMISON, Justice pro tem.

This action is upon a rejected claim. The complaint contains two counts. The first is for services as a nurse and companion, and the second count is upon an agreement of the decedent to pay a mortgage in the sum of $5,500 assumed by plaintiff in the purchase of a home. The defendant answered, admitting the due appointment of defendant Angela J. Coyle as administratrix of the estate of deceased and denying the other allegations of the complaint. The case was tried by a jury, which returned a verdict in favor of plaintiff for the sum of $5,500. Thereupon the trial court rendered judgment for plaintiff in the said sum of $5,500. From this judgment defendant appeals.

[1-3] Appellant contends that respondent's testimony was insufficient to justify the verdict or to sustain the judgment because it was inconsistent with the contemporaneous written accounts of the decedent which were approved by respondent, accepted by her as correct, and thereby made her own. It is therefore necessary to review the evidence produced by respondent. Respondent was a widow, her husband having died in 1919. In 1920 she was living with her sister, Mrs. Frances Johnson, in San Francisco. The same year she became acquainted with the decedent, and in 1921 through the efforts of decedent she entered St. Mary's Hospital as a nurse. Thereafter she purchased a small home. During all of this time she kept up her acquaintance with decedent. He was in poor health, had been separated from his family for a period of thirty-eight years, and was anxious to secure a home for his declining years. He finally suggested to her that she buy a home on Anza street. They went to the Anza street place and looked it over. The purchase price of this property was $8,400, a mortgage for $5,500 standing against it. Decedent told respondent that if she would purchase this property and trade her small home in on the deal he would pay off the $5,500 mortgage as soon as he sold certain property he owned in San Francisco. Upon this agreement respondent purchased the Anza street home, trading in her own home for a part of the purchase price and assuming the $5,500 mortgage.

The decedent, Joseph A. Coyle, died in June, 1929. He was sixty-eight years of age at the time of his death and for six or seven

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

years previous to that time he had been in poor health. Respondent's testimony regarding the decedent's agreement to pay off the said mortgage is corroborated by the testimony of her sister, Mrs. Frances Johnson, and by that of Mrs. Mary B. Wulf, Mrs. Aileen Purcell, Mrs. Agnes Armstrong and Mrs. Mary A. Sheehan, all of whom testified that decedent told them he was going to pay off the said mortgage. The decedent sold his property in San Francisco in June, 1928, for $35,000, and after paying certain liens against the property he received the sum of $15,039.29, but he failed to pay off the said mortgage as he had agreed with respondent he would do. It appears from the evidence that during the three and a half years prior to his death he resided in the Anza street property and made it his home. In the beginning of this residence he promised to pay respondent $100 per month for his board and lodging. This amount was subsequently reduced to $85 per month, and again reduced to $65 per month. Respondent never received any money at all from decedent, he paying all the expenses of the household himself.

Appellant claims the evidence shows that during the last year of his life decedent submitted to respondent the monthly account of the items which he charged against her, and that one of these items was $27.50 which was the interest on the $5,500 mortgage; that with the knowledge that this interest was charged against her respondent approved the same. Appellant contends that the respondent's testimony was insufficient to justify the verdict or sustain the judgment because it was inconsistent with the contemporaneous written accounts of decedent which were approved by respondent, accepted by her as correct, and thereby made her own. Authorities are cited in support of this contention; that where it is clearly shown that a party to an action has sworn falsely to a material matter his entire evidence should be excluded. None of the cited cases have facts similar to the facts of the instant case. The evidence in this case clearly shows that respondent reposed entire confidence in decedent. He conducted the business of selling her home; he negotiated the deal for the Anza street property. It also appears that Mrs. Findlay was of very limited business ability. There is no evidence that respondent ever approved these monthly accounts. She stated that she did not know what the bills came to; that she never bothered about anything; that the end of the month would come and decedent would pay the interest and say here it is and she would give it an off-hand look; that she thought it was all right.

In addition to the testimony of respondent, we have the testimony of the five women who heard decedent say, both before and after the purchase by respondent of the home on Anza street, that he intended to keep his agreement with respondent and pay off the mortgage when he sold his property in San Francisco. Appellant contends that the testimony of these witnesses shows merely a gratuitous promise to pay the mortgage upon respondent's Anza street home, and was insufficient to sustain the judgment. The agreement of decedent to pay this mortgage was based upon a good and sufficient consideration. He was anxious to be provided with a home; with a companion who would care for him and attend him in sickness and provide for his comfort. He entered into the agreement with respondent that if she would purchase this Anza street property where he could have a home, turn in her own home in payment of a part of the purchase price, and assume the mortgage, he would pay off the mortgage as soon as he sold his own property. We find all the elements of a good consideration present in this agreement. Civ. Code, § 1605; 6 Cal. Jur. 169; 13 Cor. Jur. 320. The testimony of these witnesses fully corroborates the testimony of respondent and amply supports the verdict of the jury. Respondent had no income; was dependent upon her daily labor for her support. Under these circumstances it is not conceivable that she would give up her own small home and assume this mortgage without some assurance that it would be paid otherwise than by her own efforts. There is ample evidence that she provided the decedent with a comfortable home, nursed him when he was sick and in all ways carried out her part of the agreement to provide him in his old age with a home.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

2 Cal.App.2d 121

REED v. ROSE et al. (two cases).

Civ. 9288.

District Court of Appeal, First District, Division 1, California.

Nov. 9, 1934.

1. Dismissal and nonsuit 🔑81(2)

Statute giving trial court power to set aside dismissal, being remedial, is to be liberally construed to permit trials on merits (Code Civ. Proc. § 473).

2. Appeal and error 🔑973

Determination of trial court acting under statute giving it power to set aside dismissals will be disturbed only for manifest abuse of discretion (Code Civ. Proc. § 473).

3. Dismissal and nonsuit 🔑81(2)

Where plaintiff who commenced actions for false arrest in 1925 failed to appear at trial in 1929 and gave no excuse for such failure when he appeared nearly six months after proceeding to set aside dismissal, denying motion to set aside dismissal *held* discretionary (Code Civ. Proc. § 473).

◆

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Two actions by Fred Reed against Edward Rose and another, consolidated for trial. From a judgment of dismissal, the plaintiff appeals.

Affirmed.

Sawyer & Sawyer and F. W. Sawyer, all of San Francisco, for appellant.

Myron Harris, of Oakland, for respondent Edward Rose.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., and R. Robert Hunter, Deputy Dist. Atty., all of Oakland, for respondent Joseph Lewis.

McNUTT, Justice pro tem.

Appeal from a judgment of dismissal for want of prosecution.

[1-3] The provisions of the Code relating to the power to set aside dismissals are remedial, intended to be liberally construed and applied by trial courts to the end that meritorious trials may be had rather than that snap or default judgments prevail. Equally recognized and established is the rule that, when a trial court has acted thereunder, its determination will be disturbed only where an abuse of its discretionary power is manifest. The type case wherein relief from one's own delinquency is sought is of a person sued, of course in invitum, who has failed, perhaps from an inadequate appreciation of a situation forced upon him, to seek timely advice or protection. Here, however, we have an actor or aggressor, a plaintiff, so unconcerned over his own invocation of judicial action to redress asserted injury that he not only let his case lie dormant for years but, when called upon after order of dismissal, to explain his so-called "excusable neglect," could not tell where he had been during much of the elapsed time, or what private enterprise incapacitated him to go forward with a public one which he had commenced. Excerpts from the record chronologically and generally significant demonstrate a sound exercise rather than an abuse of discretion by the trial court in denying relief under section 473, Code of Civil Procedure, on the grounds of the alleged mistake, inadvertence, and excusable neglect of plaintiff personally; no question of due diligence of his counsel, Mr. Sawyer, being involved.

March 27, 1926, plaintiff sued for false arrest as of April 9, 1925. The complaints were signed by Mr. Sawyer, there being two, and the actions were consolidated for trial. (Tr. p. 32, fol. 96.) February 25, 1929, defendant filed a memorandum to set case for trial. The order of consolidation having been made, the court had set April 17, 1929, as the date of trial; notice of time of trial was served April 9, 1929, and thereafter filed (Tr. pp. 62 and 63); April 17, 1929, the case was called for trial, plaintiff was absent and had no witness present; plaintiff's attorney appeared and announced that he had no evidence to offer, and that, since he had failed to legally demand a jury, he could not proceed, whereupon the court dismissed the actions (Tr. pp. 10–12, and pp. 77 and 79).

From April 17, 1929, to October 15, 1929, plaintiff (now appellant) did nothing, and on October 15, 1929, motion was made for an order to set aside the judgment of dismissal made April 17, 1929. (Tr. pp. 15–20.) The record discloses that the first appearance of plaintiff in court was October 15, 1929; November 4, 1929, after testimony, oral and documentary, had been received, the court denied the motion; November 13, 1929, plaintiff filed notice of appeal, but no steps were taken to perfect his appeal until October, 1933, when the transcript on appeal was filed.

Plaintiff could not explain why he was not in court on the calling of the case for trial.

"Q. Were you up here at the date this case was set for trial? A. No.

"Q. Why not? A. Well, I could not be here, that is all.

"Q. I beg your pardon? A. I do not know why I was not here." (Tr. p. 41.)

After the commencement of the action, and before receiving notice of setting of cause, plaintiff's attorney had made many efforts to get in touch with him, but to no avail, and he guesses that he had not given his address to his attorney. "I guess he did not have my address." (Tr. p. 37.) From the transcript, pages 33 to 47 of the plaintiff's oral examination, it appears that he did not know just where he was during the pendency of the suit, but he probably was back and forth between Mexico and Los Angeles; that he had never made any effort to communicate with his attorney; that he never saw him during any of the time; that he did not have any particular address in Los Angeles; that he guesses he was in Los Angeles on Christmas, 1928; that he knew Mr. Sawyer's address; that he never communicated with him about these cases.

December 17, 1928, Mr. Sawyer wrote to him at plaintiff's mother's address in San Jose, telling him that, not having heard from him, he had commenced the actions; that they were ready for trial; that he could not try them without evidence; that if he did not intend to appear as a witness to let him know; that he was writing him at his mother's address because she had told him that she might find out some way of getting the letter into the plaintiff's hands. February 26, 1929, plaintiff's attorney, apparently in despair, addressed plaintiff's mother at San Jose a letter, telling her that the court was fixing the date of trial which required him to say whether he would desire a jury; that for a long time past he had tried to get in touch with her son; that he was not inclined to incur further costs; that, unless her son (plaintiff) got in touch with his attorney, the actions would be dismissed. April 11, 1929, plaintiff's attorney, Mr. Sawyer, wrote Attorney Hart of Los Angeles, acknowledging a letter from Hart to him of April 6, 1929, concerning the cases. He told Mr. Hart that he (Sawyer) had replied at once to Hart's letter referred to; that meanwhile he had received a notice of trial and was informing him, and through him Mr. Reed, that the trials had been fixed for April 17, at 9:30 a. m., at which time the cases would be tried or dismissed. The letter closed, "I would like to hear from you and be sure and get word to our busy client." Hart's letter to Sawyer of April 6, 1929, says that Mr. Fred Reed had asked him to write concerning the damage suits which he understands are still pending, and announced to Mr. Sawyer that he (Hart) was Reed's attorney. April 8, 1929, Mr. Sawyer answered Hart's letter explaining that he would have to have $80 to deposit as jury fees, and that, if the demand was not made at once, it would be denied. On April 15, 1929, Mr. Hart sent Reed's check for $80 to Mr. Sawyer to be used as jury fees. However, when the case was called on the 17th, Mr. Reed, "that very busy man from Sherman" (see letter of Mr. Sawyer, Tr. p. 48), was not on hand, and, as has been said, when asked why he was not in court, answered, "I do not know why I was not here." (Tr. p. 41.)

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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2 Cal.App.2d 229

SHOEMAKER v. GOLDMAN et al.

Civ. 8056.

District Court of Appeal, Second District, Division 1, California.

Nov. 14, 1934.

1. Appeal and error ⇨999(1)

Where only issue presented in trial of action for attorney's fees was whether plaintiff's performance had been prevented by defendants, verdict for plaintiff on substantial evidence *held* conclusive.

2. Appeal and error ⇨1171(1)

On appeal by defendants, judgment for plaintiff of $1 on a cause of action, from which judgment plaintiff did not appeal, was affirmed upon principle that law does not take notice of trifles.

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Frank C. Shoemaker against Otto B. Goldman and another, in which defendants filed a cross-complaint. Judgment for plaintiff and against defendants on their cross-complaint, and defendants appeal.

Affirmed.

O. B. Goldman, in pro. per.

Frank C. Shoemaker, of Los Angeles, in pro. per.

EDMONDS, Justice pro tem.

This is an appeal from a judgment for attorney's fees rendered on verdicts of a jury. No statement of the questions involved is presented; neither is there any specification of errors relied upon by the appellant in support of the appeal.

The appellants' brief is a long statement of charges that plaintiff and his former associate in practice, who assigned his right to plaintiff, violated their obligations as attorneys at law in the duties intrusted to them. However, such charges are entirely outside of the record in the case.

The complaint is in two counts. The first cause of action is for the recovery of damages amounting to $4,000, being the unpaid balance provided for in a contract in writing for the payment of attorney's fees for the prosecution of an appeal, upon the ground that plaintiff and his associate were prevented by defendants from completing the performance of the services required by the contract. The second count is one for $1,000 on quantum meruit for services rendered.

The defendants in their answer to the first cause of action denied that the services contemplated by the contract were rendered, and alleged that they performed their part of the agreement. The answer to the second cause of action denies that any services of value were rendered, and in a cross-complaint defendants ask for the return of the retainer of $1,000 upon the ground that the services agreed to be performed by the plaintiff and his associate were never performed. The jury rendered verdicts in favor of the plaintiff for the full amount prayed for in the first cause of action, and for $1 on the second cause of action, and also against the defendants on their cross-complaint.

[1] Most of appellant's brief is given over to a statement of charges of fraud, deceit, and collusion asserted to have been practiced on defendants by the plaintiff and his associate in connection with the legal services performed. However, neither the answer nor cross-complaint presented any issues of fraud or unfair dealing. The entire issue presented in the first cause of action was whether or not plaintiff and his partner had been prevented by the defendants from perfecting the appeal which they had been employed to prosecute. This issue was determined against the defendants on substantial evidence, and the verdict of the jury will not be disturbed upon appeal.

[2] The issue in the second cause of action was by the verdict for nominal damages of $1 only, determined adversely to plaintiff and in favor of the defendants. No appeal having been taken by plaintiff from that portion of the judgment, it should be affirmed upon principle that de minimis non curat lex. Arkley v. Union Sugar Co., 147 Cal. 195, 81 P. 509.

The appeal is wholly without merit, and the judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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2 Cal.App.2d 207

EISENHUTH v. DEPARTMENT OF MOTOR VEHICLES et al.

Civ. 5150.

District Court of Appeal, Third District, California.

Nov. 13, 1934.

Hearing Denied by Supreme Court Jan. 10, 1935.

1. Highways 🔑93

Contract between chief of division of motor vehicles and county board of supervisors authorizing board to appoint traffic officers for county was not required to be in writing, and hence acceptance by chief of recommendations of county board as to traffic officers constituted appointment of traffic officers under contract with chief (St. 1923, p. 520, § 30; St. 1929, p. 617, § 30).

2. Highways 🔑93

Traffic officer appointed by chief of division of motor vehicles at time statute made such officers subject to appointment as members of highway patrol and entitled to permanent civil service status after serving one year was entitled to permanent status after working one year under appointment without limitation by chief of division of motor vehicles (St. 1923, p. 520, § 30; St. 1929, p. 617, § 30).

3. Highways ⚿93

Traffic officer appointed in 1928 by chief of division of motor vehicles and temporarily relieved from active duty after September, 1928, was not discharged so as to deprive him of status as traffic officer on January 1, 1929, and hence his service of one year under subsequent commission entitled him to permanent classification as traffic officer (St. 1923, p. 520, § 30; St. 1929, p. 617, § 30).

4. Highways ⚿93

Permanent tenure of office of traffic officer is vested right (St. 1923, p. 520, § 30; St. 1929, p. 617, § 30).

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceeding by Thomas V. Eisenhuth against the Department of Motor Vehicles of the state of California and others to obtain petitioner's reinstatement as a member of the California Highway Patrol with permanent status and back salary. From a judgment in favor of the petitioner, the respondents appeal.

Affirmed.

U. S. Webb, Atty. Gen., and Emmett J. Peterson, Deputy Atty. Gen. (John A. McGilvray, of Sacramento, of counsel), for appellants.

Elliott, Atkinson & Sitton and W. A. Latta, all of Sacramento, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The petitioner above named was awarded a judgment in the trial court directing that he be reinstated as a member of the California highway patrol, with permanent status and back salary at the rate of $175 per month. The judgment was entered upon the theory that the plaintiff was occupying the position of a traffic officer on January 1, 1929, and by virtue of subdivision i of section 30 of the California Vehicle Act of 1929 (page 617), was entitled to a permanent status as a member of the California highway patrol. From the judgment of the trial court, the respondents appeal.

Section 30 of the California Vehicle Act, approved May 30, 1923 (St. 1923, p. 520), providing for the appointment of traffic officers, incorporated in its provisions an authorization for the chief of the division of motor vehicles to enter into a contract with boards of supervisors of the different counties of the state for the appointment of traffic officers to serve in the respective counties, payment of their salaries to be made out of that portion of the funds to which the counties might be entitled to receive under the provisions of the act.

Acting under the provisions of section 30, supra, the board of supervisors of the county of El Dorado entered into a contract with Will H. Marsh, the then chief of the division of motor vehicles of the department of finance of the state of California, for the employment of two traffic officers to serve for the months of September, October, and November, 1923, at a salary of $175 per month each. Section 4 of that contract reads as follows:

"The term of employment of said traffic officers and inspectors shall be at the pleasure of the Chief of the Division of Motor Vehicles, but said employment shall be terminated by the Chief of the Division of Motor Vehicles or by said traffic officers or inspectors only upon the expiration of thirty days after a written notice of such effect has been given to the other party; provided, that any traffic officer and inspector may be removed on account of improper discharge of duty without such notice being given him."

The wording of the contract as prepared by the chief of the division of motor vehicles was mimeographed from a typewritten form. Inserted in a blank in this form were the words, "For months of September, October and November, 1923." This insertion appears to have been made by the clerk of the board of supervisors of El Dorado county. No other contract was entered into between the board of supervisors of El Dorado county and the chief of the division of motor vehicles, but from time to time, up to and including the appointment of the petitioner herein, different traffic officers for the county of El Dorado were appointed, and the parties to the contract continued to act, the board making recommendations, and appointments being made as though the contract contained blanket provisions covering all subsequent recommendations and appointments.

[1] On the part of the appellant it is contended that the contract referred to expired, by reason of the three months' limitation specified therein, on the 30th day of November, 1923. Whether the contract just referred to constituted the basis for subsequent appointments thereafter made, or constituted a subsisting and continuing agreement between the board of supervisors of the county of El Dorado and the chief of the division of motor vehicles, we think

wholly immaterial. A statement contained in the brief of the appellant we conclude correctly states the law as to what would be termed "contracts" under the California Vehicle Act of 1923, to wit:

"It was not stated in the Motor Vehicle Act of 1923 that all contracts entered into between the Chief of the Division of Motor Vehicles and the various boards of supervisors would have to be in writing. Such contracts could be entered into through the acts of the parties and the acceptance by the Chief of the Division of Motor Vehicles of 1924, 1925, 1926, 1927 and 1928 of the recommendations of the Board of Supervisors of individuals to serve as traffic officers in El Dorado County were sufficient to constitute the offer and acceptance necessary to a valid contract. Each appointment of a traffic officer for El Dorado County made subsequent to 1923 was made under a new contract without reference to the original 1923 contract which expired, by its own words, at the end of November 1923."

This being true, when the petitioner in this case was appointed a traffic officer for the county of El Dorado in May, 1928, he became and was a traffic officer in and for the county of El Dorado pursuant to a contract made, executed and existing between the board of supervisors of said county, and the chief of the division of motor vehicles.

While mention is made of numerous appointments of traffic officers for the county of El Dorado subsequent to the date of the contract herein first referred to, and the contract of employment of the petitioner, we are not concerned therewith, as this action involves only the right and status of the petitioner as such officer.

In 1929, by an act approved May 18, Statutes 1929, p. 617, section 30 of the California Vehicle Act was amended so as to create a division having charge of the enforcement of the act to be known as the "California Highway Patrol." Under the provisions of this section all traffic officers holding positions as such on January 1, 1929, were blanketed into and became members of the California highway patrol, or subject to appointment as members of the California highway patrol without civil service examination, and that after serving a year, should acquire a permanent civil service status as members of the California highway patrol.

The first question then to be determined is: Was the petitioner a traffic officer appointed by the chief of the division of motor vehicles on the 1st day of January, 1929?

The record shows the following: Letter inclosing commission from Frank G. Snook, chief of the division of motor vehicles, to Elwood Brewster, captain of the traffic squad at Placerville, to wit:

"April 20, 1928. Elwood Brewster, Captain, Traffic Squad, Placerville, California. Dear Sir: In regard to the appointment of an additional traffic officer for El Dorado county, wish to state, Thomas Eisenhuth has been selected from the three names submitted by the Board. I am enclosing herewith his commission which kindly deliver to him; also, advise us the date on which Mr. Eisenhuth commences work and his proper mailing address. Yours very truly, Frank G. Snook, Chief, Division of Motor Vehicles, By ——— Secretary."

Following the receipt of this letter and the commission, the record shows that the petitioner was duly sworn in as a traffic officer to serve in the county of El Dorado for the compensation of $175 per month.

Our attention has not been called to any limitation as to the time of service for which the petitioner was appointed, nor have we been able to discover any such limitation. The record does show an active service of approximately five months. At the end of September, 1928, it appears that the petitioner was temporarily relieved from active duty. All that appears in the record in relation thereto is the following:

"Q. How did you happen to stop your duties?

"Question by the Court: Did anybody tell you that you were to leave and lay off? A. Well, you (we) were temporarily relieved in the winter months, your Honor, with the understanding that you (we) would go back to work just as soon as conditions would justify, and the roads would be open.

"Question by the Court: Who gave you notice of your relief? A. Our superior officer, Captain Brewster.

"Question by Mr. Peterson: What understanding did you say you were given that you would go back to work? A. Well, he just told me to keep all my equipment and to keep my badge and to be ready to go back to work when they called me."

The record discloses that the petitioner performed no active duty during the year 1929; that he was not called back to work by Capt. Brewster.

On June 6, 1930, the petitioner was assigned to active duty as a traffic officer of the county of El Dorado, under a commission issued to him bearing that date, to wit:

"State of California, Department of Motor Vehicles California Highway Patrol. I, Frank G. Snook, Chief of the Division of Motor Vehicles, in accordance with the provisions of Section 30 of the California Vehicle Act, do hereby appoint, subject to the approval of the directors of the Department of Public Works, Thomas V. Eisenhuth, a state traffic officer of the California Highway Patrol to serve in the County of El Dorado, clothed with the full power to perform all the duties of the office to which I have appointed him.

"Given under my hand at Sacramento, this sixth day of June, 1930. Approved: C. De Saules, Deputy Director, Department of Public Works, Frank G. Snook, Chief, Division of Motor Vehicles."

Under this commission the petitioner remained in active duty as a traffic officer in and for El Dorado county, during the remainder of the year 1930, and during the years 1931, 1932, and up to and until the 22d day of January, 1933, at which date the following letter was addressed by E. Raymond Cato, chief of the California highway patrol, to petitioner:

"January 21, 1933. Mr. T. V. Eisenhuth, 60 Sacramento Street, Placerville, California. Dear Sir: In conformity with Civil Service law, there has been established an eligible list of state traffic officers of the California Highway Patrol, and on January 20, 1933, I received from the Division of Personnel and Organization the eligible list for El Dorado County and was notified by William Brownrigg, Chief of that Division, that temporary authorization employees cannot be justified under the law when an eligible is in existence. Therefore I have appointed an eligible from that list to serve as traffic officer in El Dorado County in the position now held by you, and on January 22, 1933, your services in the capacity of traffic officer with the California Highway Patrol will cease. Yours very truly, E. Raymond Cato, Chief, California Highway Patrol. (Carbon copy to the District Inspector and to the Captain.)"

[2] The record contains a number of exhibits and testimony relative to the attempt of the petitioner to be reinstated as a traffic officer, given active duty, and also recommendations with regard to taking civil service examination, and also the approval of the civil service commission to the effect that the commission issued by Frank G. Snook was only a temporary appointment. These proceedings, however, are not material to a determination of the rights of the petitioner herein. A reference to the record shows that the commission issued by Frank G. Snook preceded by a number of days any action by the civil service commission; nor is there anything in the commission which indicates a limitation of the term of the appointment. The appointment is expressly made in accordance with the provisions of section 30 of the California Vehicle Act. Going back to the record which we have just set forth, which must be read into and constitute the basis for the appointment, exhibits clearly, as we think, a legal appointment without limitation, and at the expiration of one year thereafter, gave to the petitioner a permanent status as such officer, with all the rights and privileges and permanency as though he had taken a civil service examination.

[3] The contention of the appellant that the petitioner was discharged from his duties in 1928 by Capt. Brewster, is untenable. The law is clear that the authority to remove was vested in the chief of the division of motor vehicles. There is not a word nor a syllable in the record indicating that Capt. Brewster was ever given any authority to discharge the petitioner. A release from active duty does not constitute a discharge. There was no limitation of time in the commission appointing the petitioner a traffic officer in 1928, and only being relieved from active duty during the winter months did not deprive him of his status as such officer on January 1, 1929, and by virtue of the act of 1929 to which we have referred, he was automatically blanketed into that class of persons who, when subsequently commissioned and serving one year, would acquire the status contended for by the petitioner in this proceeding. This being true, the attempted discharge of the petitioner as a traffic officer in January, 1933, is and was wholly void.

[4] That tenure is a vested right is no longer open to question in this state. Gastineau v. Meyer, 131 Cal. App. 611, 22 P.(2d) 31; section 30, California Vehicle Act (St. 1923, p. 520, as amended by St. 1929, p. 617).

A number of cases have been cited by the respective counsel, but as what we have said is determinative of this action, we agree with the opinion of the learned judge of the trial court, that an extended review of the cases is unnecessary.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PULLEN, P. J.

2 Cal.App.2d 173

ADAMS v. ADAMS.

Civ. 1498.

District Court of Appeal, Fourth District, California.

Nov. 10, 1934.

1. Divorce 🔑312

Notice of appeal filed more than 60 days after minute order modifying divorce decree as to children's support had been made, but less than that time after formal order was made and entered *held* filed within statutory 60 days from entry of order appealed from so as to give appellate court jurisdiction where record failed to show that minute order had ever been entered (Code Civ. Proc. § 939).

2. Divorce 🔑309

Superior court had power to modify interlocutory and final decrees of divorce by reducing amount awarded for support of minor children, even though award had been based on contract of parties (Civ. Code, § 138).

◆

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Divorce action by Celia Adams against Carl W. Adams. From an order modifying the decree of divorce awarded in the action by reducing amount of support which defendant had been ordered to pay, plaintiff appeals.

Affirmed.

Swing & Swing, of San Bernardino, for appellant.

Lester G. King and Byrne & Coughlin, all of San Bernardino, for respondent.

MARKS, Justice.

On December 31, 1931, plaintiff was awarded an interlocutory decree of divorce. During the pendency of the divorce action the parties entered into a contract settling their property rights and providing that defendant pay plaintiff $125 each month for the support of their two minor children, the payments to continue "during such time as the said child or children shall remain in the care and custody of said second party, and until such child or children shall become of age, marry or become self-supporting." The interlocutory decree, in reference to this contract, said: "It is ordered, adjudged and decreed that the property settlement agreement executed by and between the plaintiff and defendant * * * is hereby wholly approved, ratified and affirmed as a just and equitable division of the community property and settlement agreement. * * *" It was "further ordered, adjudged and decreed that pending a final judgment and until a further order of the Court in the premises 'That the defendant pay the plaintiff, Celia Adams, as and for the support of Celia Jean Adams and William Carl Adams, the minor children of plaintiff and defendant, the sum of $62.50 per month for each respective child. * * *'" The same provision for the care of the children, and approval of the property settlement agreement, are set forth in the final decree of divorce, the support for the children again being awarded "until a further order of the Court in the premises."

On April 5, 1933, at the instigation of defendant the trial judge issued an order requiring plaintiff to show cause why the monthly support of the minors should not be reduced from $125 to $60 per month. At the hearing, the decree was amended by reducing the monthly payments for the support of the children to $75. The order amending the decree contained the following findings of fact: "And it satisfactorily appearing to the Court from competent evidence adduced at the time of the hearing that:

"(a) Said defendant is a dentist by profession and was at the time of the entry of the interlocutory and final decree herein, earning and receiving from his profession a gross income of approximately $800.00 per month.

"(b) Because of business conditions, said income has steadily decreased until, at the time of said hearing on the 17th day of April, 1933, the gross income of said defendant from his profession and all other sources amounted to an average of approximately four hundred twenty-five dollars ($425.00) per month.

"(c) After deducting rent, salary for help, telephone bills, outlay for supplies, including gold, amalgam, and other materials, laboratory work performed in Los Angeles, California, the said defendant did not have sufficient income to provide himself with the common necessaries of life.

"(d) Defendant owns no real property whatsoever and no personal property which produces an income or which could be sold or hypothecated for money at this time, except his office fixtures and dental equipment with which he earns his living."

It appears that both parties appeared and testified at the hearing, but their testimony is not incorporated in the record. Therefore the foregoing findings must be treated as being supported by the evidence. It is stipulated that the property settlement agreement was considered by the trial judge in making his order.

A stipulation signed by counsel for both parties contains the following paragraph: "It is further stipulated that no evidence except defendant was a dentist by profession was taken or received either as to defendant's ability to pay or as to the necessities of plaintiff at the time the court made the interlocutory decree of divorce in the above entitled action and fixed there the amount which defendant was required to pay to plaintiff, said sum being $125.00 per month, but that such provision in said judgment and decree of divorce was inserted therein as a result of a stipulation and in accordance with said property settlement contract, and that such contract formed the basis for such provision in such decree."

[1] Defendant urges that the notice of appeal was given too late to give an appellate court any jurisdiction. Under date of June 20, 1933, the following minute order appears in the record: "It is ordered that the interlocutory and final decrees herein be, and are hereby modified by reducing the amount of support, which defendant was heretofore ordered to pay, to the sum of $75.00 per month, effective as of the first day of June, 1933." The order modifying the decree of divorce was signed and entered on July 14, 1933. The notice of appeal was signed and filed on September 11, 1933, more than sixty days after the minute order was made, and less than that time after the formal order was made and entered.

A notice of appeal must be filed within sixty days from the entry of the judgment or order appealed from. Section 939, Code Civ. Proc.; Southern Pacific R. Co. v. Willett, 216 Cal. 387, 14 P.(2d) 526. There is nothing in the record to show that the minute order was ever "entered." This makes it unnecessary for us to determine whether or not the minute order, had it been entered, would have constituted an order modifying the decree from which an appeal must be taken within sixty days from its entry. A somewhat similar situation was passed upon in Scilini v. Scilini, 214 Cal. 99, 3 P.(2d) 1020, where it was said: "On December 19, 1928, plaintiff filed an application for a modification of both the final and interlocutory decrees respecting the care and custody of the minor child, and also regarding its support. With this application the plaintiff filed a supporting affidavit by himself to which the defendant filed a counter affidavit. The application came on for hearing before the court on December 22, 1928. At that time the court made a minute order purporting to modify the interlocutory decree of divorce, and submitted for decision the application for modification of the final decree. On January 9th following, the trial court filed and entered a formal written order modifying the final decree of divorce. From this order of January 9th the defendant has taken this appeal. No appeal was taken from the minute order of the court modifying the interlocutory decree. Whatever may have been the effect of this minute order, we think it was superseded and nullified by the subsequent written order of the court of January 9th modifying the final decree of divorce and fixing and determining the rights of the parties to the care, custody, control, and support of said minor child."

[2] Plaintiff maintains that as the award of $125 per month for the support of the minors was based on a contract of the parties, it cannot be changed by the court. She cites the following California cases in support of this contention: Johnson v. Johnson, 104 Cal. App. 283, 285 P. 902; McMillan v. McMillan, 215 Cal. 435, 10 P.(2d) 465; Parkhurst v. Parkhurst, 118 Cal. 18, 50 P. 9, and Soule v. Soule, 4 Cal. App. 97, 87 P. 205.

As we understand these decisions, none of them support the position of appellant. The question of the modification of a court order providing for the support of a minor child was not involved in the Johnson Case. An order reducing an allowance made for the support of a divorced wife and a minor child was affirmed in the McMillan Case. The Parkhurst Case was decided prior to the amendment of section 138 of the Civil Code in 1905. (St. 1905, p. 43.) In that case the Supreme Court affirmed an order of the superior court refusing to amend a decree of divorce by awarding a mother money for the support of herself and a minor child. In the Soule Case the court recognized the right to subsequently modify an allowance for support, but held that the power to modify did not include the right to permanently annul the award.

Since the amendment of section 138 of the Civil Code in 1905, it cannot be doubted that the superior court has power to modify an interlocutory or final decree of divorce by changing the amount awarded for the support of a minor child or make an award for such purposes if none was made in the decrees. Lewis v. Lewis, 174 Cal. 336, 163 P. 42; Davies v. Fisher, 34 Cal. App. 137, 163

P. 833. In Merritt v. Merritt, 106 Cal. App. 234, 289 P. 240, 241, it was said: "The parties to this action were married June 23, 1920. One daughter, named Andriana, who was four years of age at the time of the trial, was born as the issue of the marriage. A suit for divorce, on the ground of adultery, was filed December 1, 1926. On November 30, 1926, the property rights of the parties were settled by the execution of a written agreement. By the terms of this contract the respondent was allowed $750 per month as alimony, and the additional sum of $250 a month for the maintenance and support of the minor child. December 5, 1927, an interlocutory decree of divorce was rendered in favor of the respondent, awarding her the custody of the minor child, together with the monthly payments above mentioned, pursuant to the contract settling the property rights. Subsequently, upon proceedings duly had, the court modified this interlocutory decree by allowing the respondent an additional $100 per month for the education and maintenance of the child. From this order an appeal was perfected. * * * The fact that the order is in conflict with the provisions of the property settlement contract which was executed by the parties with respect to the maintenance of the child does not impair the validity of the order. While it is true that the discretion of the court to make an allowance for the maintenance of a minor child is limited to the conditions and financial ability existing at the time of the order (9 Cal. Jur. 802, § 143; Schammel v. Schammel, 105 Cal. 258, 38 P. 729), the parents may not abridge the rights of the minor or deprive her of an adequate support by any prior agreement. 9 Cal. Jur. 803, § 144; Lewis v. Lewis, 174 Cal. 336, 163 P. 42; Parkhurst v. Parkhurst, 118 Cal. 18, 50 P. 9. The amount is within the reasonable discretion of the court. Bancroft v. Bancroft, 178 Cal. 352, 173 P. 582." See, also, Karlslyst v. Frazier, 213 Cal. 377, 2 P.(2d) 302; Moog v. Moog, 203 Cal. 406, 264 P. 490; Smith v. Superior Court, 89 Cal. App. 177, 264 P. 573.

Plaintiff urges that the trial court must be governed by consideration of the welfare of the minor in making an award for support; that reducing the amount formerly allowed for support cannot promote such welfare; that therefore the court in changing an award cannot reduce but can only increase it. We cannot follow the logic of this argument. Under many circumstances and for many reasons the reduction of the amount of support money might be made solely out of consideration of the best interest and welfare of a child. Among the many cases affirming orders reducing awards formerly made for support of minor children, the following may be cited: Beal v. Beal, 218 Cal. 755, 24 P.(2d) 768; McMillan v. McMillan, supra, and Soule v. Soule, supra.

Nothing which we have said should be construed as bearing upon the civil liability of defendant under the terms of his contract when considered independent of the decrees and orders of court which we have been considering. Griffith v. Superior Court (Cal. Sup.) 35 P.(2d) 317.

Order affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

2 Cal.App.2d 202

CALIFORNIA TREASURE BOX v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 9595.

District Court of Appeal, Second District, Division 2, California.

Nov. 13, 1934.

Attachment 🔑6

Mandamus will not lie to require discharge of an attachment issued out of action in which complaint alleged that plaintiff purchased corporate stock under defendant's false pretenses and that plaintiff promptly rescinded, and in which prayer was for return of purchase money paid.

◆

Mandamus proceeding by the California Treasure Box against the Superior Court of California in and for Los Angeles County and Thomas C. Gould, Judge.

Alternative writ discharged, and peremptory writ denied.

Frank L. Simons, of Los Angeles, for petitioner.

Everett W. Mattoon, County Counsel, and S. V. O. Prichard, Deputy County Counsel, both of Los Angeles, for respondents.

STEPHENS, Presiding Justice.

This proceeding is one in mandamus to require the discharge of an attachment issued

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out of an action in the superior court. It is alleged in the complaint that corporate stock was purchased by the plaintiff under defendant's false pretenses and that plaintiff promptly rescinded. The prayer is for the return of the purchase money paid, with interest.

The facts bring the issue within the principles expressed in McCall v. Superior Court (Cal. Sup.) 36 P.(2d) 642.

The alternative writ is discharged, and the peremptory writ is denied.

We concur: CRAIL, J.; WILLIS, Justice pro tem.

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2 Cal.App.2d 87

BINFORD v. PURCELL.

Civ. 1090.

District Court of Appeal, Fourth District, California.

Nov. 7, 1934.

1. Automobiles 🔑150

Motorist driving on city street must anticipate use of street by others and maintain vigilant lookout for them.

2. Automobiles 🔑181(1)

In automobile guest's action against host, evidence that host drove for at least 120 feet without seeing another car standing in her path and plainly within her view, had she looked, and collided with rear of such car, *held* to sustain finding that host was grossly negligent (St. 1929, p. 1580, § 141¾).

3. Automobiles 🔑224(4)

Automobile guest who was looking at sewing and books in her lap and did not see other car in road, and who neither exercised, nor had right to exercise, control over host's automobile, *held* not contributorily negligent, as respects right to recover for injuries against host (St. 1929, p. 1580, § 141¾).

4. Automobiles 🔑224(5)

Automobile guest had no duty of warning host of danger of which guest was not conscious (St. 1929, p. 1580, § 141¾).

5. Damages 🔑132(3)

$4,000 award for cuts on top of head and forehead, injuries to teeth, and nervous shock *held* not excessive.

Evidence disclosed that plaintiff received two cuts on her forehead which reached to skull and one cut across her head; that cuts on forehead were contused and left visible scars; that left front incisor was knocked loose and its nerve and nerve of next tooth were killed; that both teeth would have to be removed and replaced; and that plaintiff suffered considerable pain and nervous shock.

◆

Appeal from Superior Court, San Diego County; V. N. Thompson, Judge.

Action by Harriet Binford against Adelaide Purcell. From a judgment for plaintiff and from an order denying a motion for a new trial, defendant appeals.

Judgment affirmed, and appeal from the order dismissed.

Edward J. Kelly, of San Diego, for appellant.

Fred A. Steiner, of San Diego, for respondent.

MARKS, Justice.

Plaintiff and defendant had been friends for a number of years, and on December 9, 1930, were college classmates. On the afternoon of that day plaintiff was riding in the automobile of defendant south on First street in the city of San Diego. At a point on the west side of First street, about 50 feet south of A street, the automobile driven by defendant came into collision with an automobile driven by R. S. Smith and a second car which was parked at an angle of about forty-five degrees to the west curb of First street. Plaintiff's head went through the windshield of defendant's car, and she received the injuries which form the basis of this action.

The action as originally filed sought damages from Adelaide Purcell and R. B. Smith. The case was tried before the trial judge sitting without a jury. He found Smith free from any negligence, and found Miss Purcell guilty of gross negligence which proximately caused the injuries of plaintiff and awarded her damages in the sum of $6,076. These were reduced to $4,000 on the motion for new trial.

The following questions are presented on this appeal: (1) Does the evidence support the finding that defendant was guilty of gross negligence which proximately caused the accident? (2) Was plaintiff guilty of contributory negligence? (3) Are the damages excessive?

We have studied the record and find the evidence sharply conflicting. There is evidence supporting the contention of defendant that just prior to the accident she was driving south on First street at less than 15 miles an hour and in a careful and prudent manner; that the Smith car suddenly left its position where it was parked at an angle of about forty-five degrees to the west curb of First street, and without warning backed into the front of defendant's car, causing the accident. The trial court did not accept this evidence as true, and found against this theory.

The evidence supporting the findings and judgment may be summarized as follows: First street and A street intersect each other at right angles. First street is 52 feet in width between curbs, and A street probably about 50 feet between curbs. First street descends to the south on the following grades: North of A street, 2.8 per cent., across A street, 3 per cent., and south of A street, 3.4 per cent. Defendant drove her automobile south on First street, from a point several hundred feet north of A street to the place of the accident, at a speed of between 30 and 35 miles an hour. A truck with a panel body was parked a few feet north of the Smith car. Smith entered his automobile and backed away from the curb at a speed of between 3 and 4 miles an hour. When he had cleared the rear of the truck, he saw defendant's car approaching southerly on First street at a point some distance north of A street. He continued backing his car, and stopped when it was about parallel with the curbs of First street. He again looked north on First street, and, when he had stopped his car, defendant's car was still north of A street and more than 100 feet from him. He then looked ahead as he shifted from reverse into low gear. His car was at rest between two and three seconds when defendant ran into it from the rear. He had not straightened his front wheels, and the force of the impact drove his car back into the parking space it had left, over the curbing and onto the sidewalk. Defendant's car continued south, and collided with another parked car.

In Krause v. Rarity, 210 Cal. 644, at page 655, 293 P. 62, 66, 77 A. L. R. 1327, it is said: "The term 'gross negligence' has been defined as 'the want of slight diligence,' as 'an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others,' and as 'that want of care which would raise a presumption of the conscious indifference to consequences.' 19 Cal. Jur. p. 554; Coit v. Western Union Tel. Co., 130 Cal. 657, 63 P. 83, 53 L. R. A. 678, 80 Am. St. Rep. 153. Where liability attaches only for gross negligence, it is for the jury, under proper instructions by the court, to pass upon the question whether such negligence exists. Merrill v. Pacific Transfer Co., 131 Cal. 582, 63 P. 915; 19 Cal. Jur. p. 728."

[1, 2] When we apply this definition to the facts before us, we are forced to the conclusion that the finding of gross negligence is supported by the evidence. Defendant testified that she did not see the Smith car until the moment of the impact. According to the evidence in the record, her car must have been at least 120 feet distant from the Smith car when it had backed from the curb and was stopped in the street in front of her. A person driving an automobile on a city street is required to anticipate that others will be using it, and a vigilant lookout for them must be maintained. That she drove her automobile for a distance of at least 120 feet without seeing another car standing in her path, and plainly within her view, had she looked, and into the rear of that car, justifies the conclusion that she was driving with "the want of slight diligence" and with "an entire failure to exercise" that slight care which the law required of her; in other words, she was guilty of gross negligence and liable to her guest for the damages resulting therefrom. Section 141¾, California Vehicle Act, in effect Aug. 14, 1929 (St. 1923, p. 517 as added by St. 1929, p. 1580).

[3, 4] There is no merit in the contention that plaintiff was guilty of contributory negligence. She testified that she had some sewing and books in her lap and was looking at them and did not see the Smith car in the road. She neither exercised, nor, so far as the record shows, had any right to exercise, any control over the automobile in which she was riding. Neither did she owe a duty of warning the driver of a danger of which she was not conscious. Krause v. Rarity, supra.

[5] While the amount of the judgment was ample to recompense plaintiff for her injuries, we cannot say as a matter of law that its size indicates passion, prejudice, or corruption on the part of the trial judge. Plaintiff received two cuts on her forehead which reached to the skull, and one cut across the top of her head. The cuts on her forehead were contused and left visible scars. Her left front incisor was knocked loose, and its nerve and the nerve of the next tooth were

killed. The incisor was restored to its proper position, but was noticeably discolored at the time of the trial. Both teeth will have to be removed and replaced. Plaintiff suffered considerable pain and shock to her nervous system. It is well known that some scars cause permanent disfigurement, while others are gradually absorbed over a period of years. The trial judge saw the scars. From the evidence before us, we cannot determine that they will not permanently disfigure the plaintiff. We cannot conclude that the judgment is excessive as a matter of law.

The judgment is affirmed. The attempted appeal from the order denying the motion for new trial is dismissed.

We concur: BARNARD, P. J.; JENNINGS, J.

◆

2 Cal.App.2d 127

SNELL v. BYINGTON et al.

Civ. 9279.

District Court of Appeal, First District, Division 2, California.

Nov. 9, 1934.

Hearing Denied by Supreme Court Jan. 7, 1935.

1. Municipal corporations 🔑220(3)

That municipal agency of city and county of San Francisco was awarded construction contract at time when wages of agency's employees had been fixed did not preclude wage reduction of agency's employees under provision of charter authorizing reduction in wages of all employees of city and county in event of extraordinary economic conditions, where none of agency's employees were engaged on term contract (St. 1933, p. 3049, § 70.1).

2. Municipal corporations 🔑220(3)

That cost of construction work of municipal agency of city and county of San Francisco was not paid from taxes but from bonds sold before work was commenced did not preclude wage reduction of agency's employees under provision of city charter authorizing reduction in wages of all employees of city and county in event of extraordinary economic conditions (St. 1933, p. 3049, § 70.1, subd. 2).

3. Municipal corporations 🔑220(3)

That employees of city and county of San Francisco, municipal agency which was awarded construction contract, were not regular employees with civil service standing, but were specially employed, did not preclude wage reduction of agency's employees under provision of charter authorizing reduction in wages of all employees of city and county in event of extraordinary economic conditions (St. 1933, p. 3049, § 70.1).

4. Municipal corporations 🔑220(3)

Reduction of wages of employees of municipal agency awarded construction contract was proper, under provision of city and county of San Francisco charter for wage reduction of all city and county employees in event of extraordinary economic conditions, although cost of contract was to be paid from bonds, where such deduction would relieve emergency economic situation (St. 1933, p. 3049, § 70.1).

5. Municipal corporations 🔑220(3)

Provision of city and county of San Francisco charter for wage reduction of city and county employees in event of extraordinary economic conditions made reduction of all salaries and wages of city employees mandatory during emergency economic conditions, so that recommendation of municipal agency, which was awarded construction contract by Public Utilities Commission, or Public Utilities Commission as to salaries of employees of agency, did not preclude wage reduction (St. 1933, p. 3049, § 70.1).

6. Municipal corporations 🔑220(3)

Provision of city and county of San Francisco charter reducing wages of all city and county employees in event of extraordinary economic conditions was applicable to employees of municipal agency working outside city and county of San Francisco on construction of water system, since provision, being free from ambiguity and uncertainty, would not be construed to except any employees (St. 1933, p. 3049, § 70.1).

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by W. H. Snell against Lewis F. Byington and others, as members of and constituting the Public Utilities Commission of the City and County of San Francisco, and others. From a judgment for the defendants, the plaintiff appeals.

Affirmed.

John J. Dailey, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Dion R. Holm, Asst. City Atty., both of San Francisco, for respondents.

STURTEVANT, Justice.

The city and county of San Francisco is operating under and governed by a charter which took effect January 8, 1932 (Stats. 1931, p. 2973). For some years it has been engaged in constructing a water system known as the Hetch Hetchy project under which it is preparing to bring, through pipes, tunnels, etc., water from the Sierra Nevada Mountains to San Francisco. In 1932 it was engaged in boring certain tunnels in Alameda county. To do that construction work it let a contract to Hetch Hetchy Project Department, a municipal agency. It entered upon the performance of its contract and, at the time this action was commenced, it had approximately 750 employees—about four-fifths of whom were laborers and the others engineers, inspectors, etc. When the world-wide depression was affecting all lines of business, an amendment to the charter was adopted which is known as section 70.1 (Stats. 1933, p. 3049). After the amendment took effect, the board of supervisors, acting thereunder, adopted a resolution reducing compensation of the officers and employees as provided in said section 70.1. Thereafter a controversy arose as to whether said section and the resolution adopted thereunder were applicable to the said employees and officers so engaged in the construction work being done in Alameda county. For the purpose of settling that controversy, W. H. Snell, one of the employees, commenced this action in behalf of himself and all other employees of said Hetch Hetchy Project Department who are working exclusively on said construction work. The plaintiff's complaint purports to state a cause of action asking for declaratory relief. Code Civ. Proc. § 1060 et seq. The fiscal officers were named as defendants and appeared and filed a general demurrer. It was sustained, and, the plaintiff declining to amend, a judgment in favor of the defendants was entered. From that judgment the plaintiff has appealed.

The case presents but one point, and that is a question of statutory construction. The plaintiff contends that neither he nor any other of the employees of said Hetch Hetchy Project Department who are working outside of the city and county of San Francisco and employed exclusively on said acqueduct and tunnel construction work are subject to the provisions of said section 70.1 of the charter or to the salary and wage percentage deduction therein scheduled. On the other hand, the defendants contend that the plaintiff and all other employees of the Hetch Hetchy Project Department are included within the terms of the statute, whether they are working inside of San Francisco or outside. The pertinent parts of section 70.1 are as follows.

"Section 70.1. Whenever, in the judgment of the Mayor and the Board of Supervisors, extraordinary economic conditions actually exist due to unemployment, fire, earthquake, flood or other calamity, which adversely affect the life, health and welfare of the citizens of the City and County or of any considerable portion thereof, the Board of Supervisors, by a three-fourths vote of all of its members, with the concurrence of the Mayor, shall have power as follows, to-wit: * * *

"Sub. 2. To provide that while said emergency as declared shall continue to exist there shall be deducted from the gross salaries and compensations, exclusive of pension and retirement allowances, *of each officer and employee* of the City and County of San Francisco, including officers and employees of the Board of Education, not more than the respective amounts hereinafter set forth. * * *

"If said salary and compensation deductions are not reflected in the annual budget and appropriation ordinances, as set forth in subdivision 3 of this section, the amount of said deductions shall be used for the purpose of meeting or alleviating the emergency which has been declared, or to balance any deficiency existing in the general funds of the City arising by reason of the delinquency in the payment of taxes or other revenue as compared with the anticipated revenues over the same period. Provided that where salaries or compensations are paid out of bond funds, utility funds, or other trust funds, which are not provided from the revenues of the City, all deductions made shall revert to the respective funds from which said salaries or compensations are paid. * * *

"Sub. 6. During the period that any emergency shall exist after being so determined as hereinbefore provided, the Comptroller, with the approval of the Mayor and the Board of Supervisors, may reallocate any unencumbered balance, or any part thereof, to the credit of any department or office exclusive of moneys or appropriations made or required to be made to any bond, bond interest, bond redemption, pension, utility, or trust fund, so that the same shall be available to meet the necessities of said emergency, irrespective as to whether the amount allocated to said department or office is fixed by this Charter or is the result of a tax provided by said Charter to be levied for said department. * * *

"The provisions of this section shall have precedence over conflicting provisions of this

Charter, but nothing herein contained shall adversely affect the rights of the officials and employees as set forth in section 71 of the Charter, during the period when no public emergency exists. * * *" (Italics ours.)

[1-6] The plaintiff states that: "The Hetch Hetchy Project Department is engaged in the construction of these tunnels under a contract awarded the department by the Public Utilities Commission and so awarded at a time when the wages of the employees engaged in the work had already been fixed." The fact that the wages had been fixed is not helpful. The same statement could be made regarding any other employee in the services of San Francisco. It is alleged in the complaint that about four-fifths of the employees are working on a wage resting on a daily or hourly basis, and that the others are working on a salary or wage resting on a monthly basis. No fact is stated showing that any one of the employees or officers is, or was, working on a term contract. He also states that: "The cost of the tunnel construction work is not paid from the proceeds of taxes, but is paid from funds realized from bonds which had already been sold and the proceeds deposited in the treasury before the contract was awarded." This statement is not helpful. The provisions of section 70.1 are broad and general, and contain no limitation showing that the employees therein mentioned were not to include those who were paid out of a bond fund or other special fund. The last excerpt which we have quoted from subdivision 2, and especially the latter part thereof, contains a clear intimation that no such limitation was implied or intended. It is next asserted that: "The employees of the Hetch Hetchy Project Department are not regular employees of the City and County; they have no civil service standing as such; and they are employees of the department specially employed in the carrying out of the contract awarded." Turning back to the portions quoted from section 70.1, it will be noted that there is no language limiting the operation of the statute to only such employees as may be said to be "regular," having "civil service standing," and those "specially employed." Again it is stated by the plaintiff that: "The emergency situation to be relieved by the amendment is not affected in the slightest by the continued payment to these employees of the wages as heretofore fixed." With this statement we do not agree. If the reductions are made, the total of those reductions will serve to augment the bond fund where they will remain. If that bond fund is not exhausted, and if additional costs become necessary, no tax will be required to supplement it. If that bond fund in the end contains a surplus, such surplus can be used to pay off bonds and interest thereon, and the taxpayers will not be taxed to accumulate a fund for those purposes. Either one of these reasons is entirely sufficient, in the absence of an express provision contained in the statute, justifying a holding that the broad language of the statute was adopted for the express purpose of covering those who occupy the status of the plaintiff and his associates. The last claim made by the plaintiff is that: "The reduction in wages sought to be imposed on these employees is not the result of action taken by the Hetch Hetchy Project Department or by the Public Utilities Commission to reduce wages, but is claimed to be mandatory under the provisions of subdivision 6 of the amendment." The defendants reply to that contention as follows: "This argument is quite true. The amendment under consideration passed by a majority of the voters who by a similar vote created the Hetch Hetchy Project Department and the Public Utilities Commission enacted in paragraph 2 of subdivision 6 of section 70.1 of the charter that 'the provisions of this section shall have precedence over conflicting provisions of this charter, * * *' so that what the Hetch Hetchy Project Department or the Public Utilities Commission may or may not have done in recommending salaries to be paid is of no consequence, as the people have made it mandatory that all salaries and wages of city employees be reduced." With that reply we fully concur. The plaintiff cites several decisions which state principles of law to govern the courts in construing statutes. Among others he quotes from Dillingham v. Welch, 179 Cal. 656, on page 658, 178 P. 512, 514, where the court said: "The statute, like all statutes, must be read in view of the evident purpose of the Legislature in its enactment." In all that we have said above we think that we have but followed the rule as so stated. However, as we see the matter, the rule which we are inclined to apply is that stated in Davis v. Hart, 123 Cal. 384, 55 P. 1060. On page 387 of 123 Cal., 55 P. 1060, 1061, Mr. Justice Temple, writing the opinion of the court, stated: "A cardinal rule of interpretation is that a statute free from ambiguity and uncertainty needs no interpretation. This must be so, for all interpretation and construction is for the purpose of ascertaining the legislative will. When this is clear, interpretation is not allowable." So in the instant case, picking up the amendment (section 70.1) by its four corners and

reading it with due care, we think it is entirely clear and beyond debate that in enacting the amendment the people were providing for retrenchment in their employment costs, and that they did not provide, nor intend to provide, any exceptions.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

2 Cal.App.2d 245

BROWN v. BOARD OF POLICE COM'RS OF CITY OF LOS ANGELES et al.

Civ. 8070.

District Court of Appeal, Second District, Division 1, California.
Nov. 15, 1934.

1. Municipal corporations 🔑185(3)

Letters to city chief of police by "John Doe, member Board of Police Commissioners" requesting, and by board recommending, removal of officer, *held* not to have made removal in consequence of order by chief invalid on theory that board had actually removed officer (St. 1925, p. 1090, § 202).

2. Mandamus 🔑172

On petition for mandamus to compel reinstatement of police officer, court could consider only whether chief of police had removed petitioner and board of police commissioners had made investigation of grounds for removal in accordance with charter provisions, and court could not inquire into prejudice of board or review conclusions of board (St. 1925, p. 1090, § 202).

3. Mandamus 🔑154(5)

In absence of allegation in petition for mandamus to compel reinstatement of petitioner as police officer and payment of back salary, that claim had been made and filed with city as required by charter, petition was insufficient to support judgment for back salary (St. 1925, pp. 1090, 1137, §§ 202, 360; St. 1927, p. 2014, § 376).

◆

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Petition by Edward D. Brown against the Board of Police Commissioners of the City of Los Angeles and others, for writ of mandamus requiring defendants to reinstate petitioner on the police force, and for payment of salary from date of removal. From a judgment overruling a demurrer to the petition and ordering writ to issue as prayed for, defendants appeal.

Reversed, with directions.

Erwin P. Werner, City Atty., Frederick von Schrader, Asst. City Atty., and G. Ellsworth Meyer, Deputy City Atty., all of Los Angeles, for appellants.

Paul Taylor and Richard Kittrelle, both of Los Angeles, for respondent.

HAHN, Justice pro tem.

The questions presented for our consideration in this appeal arise from the court's order overruling a demurrer filed to respondent's amended petition for a writ of mandate directed to the board of police commissioners of the city of Los Angeles (hereinafter referred to as the board) requiring it to reinstate petitioner on the police force from which he claims he was illegally removed, and for payment of his salary from the date of his removal.

The board, as respondents in the mandamus proceeding, after its demurrer had been overruled, refused to file an answer. Whereupon the court proceeded with the hearing on the petition, and upon its conclusion made findings sustaining the allegations of the petition and issued its writ of mandate as prayed for in the petition, directing the board to reinstate the petitioner as a member of the police force of the city of Los Angeles and ordered payment of his salary from the date of his removal.

In support of its appeal, the board urges: First, that the petition does not state facts sufficient to entitle petitioner to the relief prayed for, in that from the petition it appears that in his removal compliance was had with the requirements of the city charter; and, secondly, in any event, his petition does not set forth facts sufficient to entitle him to a judgment in this action for back salary.

In his petition plaintiff alleges: That on October 19, 1929, he was suspended as a police officer from the force because of the fact he had been indicted by the grand jury of Los Angeles county for the crime of bribery; that this charge was subsequently dismissed on motion of the district attorney; that he made application to be reinstated on the police force; that on March 15, 1930, the board of police commissioners of the city of Los Angeles ordered the chief of police to remove petitioner from the force by filing another charge against him; that on March 18, 1930, the chief of police filed with the board a written notice of removal and served a copy thereof on petitioner; that again on March 19, 1930, the board of police commissioners again ordered the chief of police to remove petitioner from the force; that these alleged orders for his removal were contained in certain letters attached to and made a part of the complaint, designated Exhibits A, B, C; that petitioner's removal was not the voluntary act of the chief of police, but was in fact the act of the board of police commissioners; that on April 8, 1930, a hearing was held by the board on the charges contained in the letter of removal filed by the chief of police; that the charges did not constitute sufficient ground for removal; that said board was prejudiced against him and disqualified to fairly hear and pass on the charges; that after the alleged hearing the board upheld the removal, and a letter from the board announcing its action was served on petitioner, Exhibit D; that petitioner committed no act warranting his removal; that the acts of the board and chief of police were and are void.

The exhibits set forth in the petition read as follows:

"Exhibit A

"March 15, 1930.

"R. E. Steckel, Chief of Police.

"Re: Edward D. Brown Policeman, Code 3502.

"Dear Sir: Kindly make out 'Form for Removal or Suspension' dating same March 12, 1930, and have it served on Edward D. Brown, before the close of March 17, 1930, setting forth the information given below:

" 'I hereby remove you from your position as Policeman, Code 3502 in the Police Department of the City of Los Angeles, effective at the close of October 18, 1929, for the following cause:

" ' "That you are not a fit and suitable person to fill the position of police officer of the City of Los Angeles, and that your conduct has been such as to be unbecoming to a police officer of the City of Los Angeles, in that facts revealed in your testimony given at your trial in Department 25 of the Superior Court, Case No. 38,785 show neglect of duty in that you knew the location of the place of business of a notorious bootlegger, and also the address where intoxicating liquor was illegally served, and in neither instance did you make an effort to enforce the law." '

"Yours truly,

"John Doe,
"Member, Board of Police Commissioners."

"Exhibit B

"March 18, 1930.

"Honorable Board of Police Commissioners,
City Hall, Los Angeles, Cal.

"Gentlemen: I have this date dismissed Edward D. Brown, policeman, Code 3502, in the Police Dept., effective at the close of Octo. 18,-29, date of suspension account of following reason:

"That you are not a fit and suitable person to fill the position of police officer of the City of Los Angeles in that facts revealed in your testimony given at your trial in Dept. 25 of the Superior Court, Case No. 38-785 show neglect of duty in that you knew the location of the place of business of a notorious bootlegger, and also an address where intoxicating liquor was illegally served and in neither instance did you make an effort to enforce the law.

"Subject to your approval

"Respectfully,

"R. E. Steckel
"Chief of Police."

"Exhibit C

"March 19,-30

"R. E. Steckel, Chief of Police, Los Angeles, Cal.

"Dear Sir: At a special meeting of the Board of Police Commissioners held March 18th, this Commission took action recommending that the services of Edward D. Brown, known as Roughhouse Brown, be discontinued, for the reason that the Transcript of the testimony taken at his trial, while under indictment for bribery, revealed that he consorted with bootleggers and was seen at a place where liquor was served without making an arrest.

"Yours very truly,

"George T. Jeffers, Secretary."

"Exhibit D

"Board of Police Commissioners
"Executive office Police Department
"City of Los Angeles

"May 19, 1930.

"Edward D. Brown, 2047 Browning Boulevard, Los Angeles, California.

"Dear Sir: At a regular meeting of the Board of Police Commissioners held on Tuesday, May 6th, 1930, this Board adopted the following written report of the Complaints and Appeals Committee:

"Reporting on the appeal of Edward D. Brown against removal from the Police Department as policeman by the Chief of Police, the Commission announces the following decision: 'The action of the Chief is sustained and the findings of the Commission made a matter of records.'

"Yours very truly,
"Arthur G. Baraw, Secretary."

Section 202 of the Los Angeles city charter, in effect at the time of removal, which provides for and controls the suspension and removal of officers from the police force, reads as follows: "Sec. 202. The Chief of Police shall have the power to suspend or remove any officer or employee in the Police Department; but no such suspension or removal shall be made except for cause, which shall be stated in writing and filed with the Board of Police Commissioners, with certification that a copy of such statement has been served upon the person so suspended or removed personally, or by leaving a copy thereof at his last known place of residence if he cannot be found. Upon such filing the suspension or removal shall take effect. Within fifteen days after such statement shall have been filed, the said board, upon its own motion, may, or upon written application of the person so suspended or removed file with said board within five days after service upon him of such statement, as above provided, shall proceed to investigate the grounds for such suspension or removal. If, in the case of a removal, the said board, after such investigation, shall find in writing that the grounds stated were insufficient, or were not sustained, and also finds in writing that the person removed is a fit and suitable person to fill the position from which he was removed, the said board shall reinstate him in such position; and if, in the case of a suspension, the board, after such investigation, shall find in writing that the grounds stated were insufficient, or were not sustained, the said board shall restore the person so suspended to duty. *The order of said board with respect to such suspension or removal shall be final and conclusive.* Any person restored to duty or reinstated in his position after suspension or removal, as provided in this section, shall be entitled to receive such compensation from the city the same as if such suspension or removal had not been made." (Italics ours.) St. 1925, p. 1090.

[1] Having predicated his allegation of removal by the board on the letters of March 15th and March 19th, these allegations can have no greater force than is furnished by the letters themselves. These letters wholly fail to support the charges of the pleader that he was removed by the board of police commissioners. The one dated March 15th is signed "John Doe, member Board of Police Commissioners." Assuming that "John Doe" was a member of the board of police commissioners, the letter is nothing more than the expressed wish of one member of the board. That the chief of police may exercise his power of removal at the request of one or more persons, when he is satisfied that sufficient reason exists for his action, in no way weakens or affects his order of removal when made in accordance with the provisions of the charter. From the petition itself it appears that the requirements of the city charter were fully met by the chief of police in issuing his order of removal. Nor is the letter of March 19th anything more than a recommendation to the chief of police. The resolution of the board therein referred to does not purport to be an order of removal. Furthermore, it appears that this letter was written after the order of removal was made by the chief of police, and hence could not be said to have directed the chief's order.

After the order of removal was filed and served, a hearing was held by the board to consider the charges made as a basis for the removal in the manner provided by the charter. We must assume, in the absence of any allegations to the contrary, that petitioner was afforded adequate opportunity to offer evidence on his behalf. After the hearing, an order was made by the board sustaining the order of removal.

[2] The sole question that may be raised in this proceeding for a writ of mandate is whether or not the chief of police complied with the provisions of the charter in removing petitioner from the police force, and whether or not thereafter, as requested by petitioner, the board made the investigation of the grounds given for his removal as required by the charter. As already pointed out, the petition itself discloses that all these requirements of the charter were complied with by the chief of police and the board. It is true that the petition contains other allegations of prejudice on the part of members of the board and criticism of the procedure followed at the hearing. But these are matters of which the court in this proceeding has no jurisdiction. Nor may the court review the conclusions of the board as to the truth or falsity of these allegations. By the charter it is specifically provided that the conclusions of the

board upon such an investigation are "final and conclusive." Boyd v. Pendegast, 57 Cal. App. 504, 207 P. 713.

[3] Appellants next urge that the petition is insufficient to support any order or judgment for back salary as prayed for, and by the court made. This point is well taken. By the terms of the city charter, section 360 (St. 1925, p. 1137) and section 376 (St. 1925, p. 1141, as amended by St. 1927, p. 2014), an action may not be maintained to recover on a claim for back salary, until the claim has been made and filed with the city as required by said sections. There is no allegation in the petition that such claim was so made and filed. Shannon v. City of Los Angeles, 205 Cal. 366, 270 P. 682.

From the foregoing considerations it follows that the trial court erred in not sustaining appellants' demurrer to the amended petition. The judgment therefore is reversed, with instructions to the trial court to sustain the demurrer of the board of police commissioners to petitioner's amended petition, with permission to amend as the court may deem proper.

We concur: CONREY, P. J.; YORK, J.

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2 Cal.App.2d 231

NAYLOR v. NAYLOR.

Civ. 9380.

District Court of Appeal, First District, Division 1, California.

Nov. 15, 1934.

1. Executors and administrators 🔑221(1)

In action against estate for sum agreed upon in contract between decedent and wife in settlement of property rights, burden was on wife to show performance of her part of agreement.

2. Executors and administrators 🔑221(7)

In wife's action to recover from deceased husband's estate amount provided for by terms of settlement contract executed before husband's death in return for wife's relinquishment of rights to community property, evidence *held* to show that wife performed her part of contract.

3. Executors and administrators 🔑451(3)

In action by wife against husband's estate for amount provided for in settlement contract in return for wife's relinquishment of all rights to community property, instructions *held* sufficient to cover issue of whether wife had performed her part of contract.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Era Eveline Naylor against Charles B. Naylor, as executor of the estate of Charles F. Naylor, also and sometimes called Charley F. Naylor, deceased. Judgment for plaintiff, and defendant appeals.

Affirmed.

Edward E. Craig and Charles C. Loosli, both of Berkeley, for appellant.

William T. Paullin and Alfin N. Nelson, both of Oakland, for respondent.

TYLER, Presiding Justice.

Action by a wife against the estate of her deceased husband for breach of a property settlement. The creditor's claim upon which the action is based arose out of the following facts: On the 9th day of April, 1931, Charles F. Naylor and Era Eveline Naylor, his wife, entered into a contract settling and determining their property rights arising out of their marital status. The contract recites that the parties have ceased to live together and that they have agreed upon a property settlement. It provides that by the performance of mutual promises the wife is to relinquish and set over to her husband all her right, title, and interest in and to the community property, and the husband is to pay the wife the sum of $900 in installments of $75 a month until a total of $900 has been paid, and in addition thereto that the husband maintain and keep certain specified policies of life insurance in force for the benefit of the wife for one year from the date of the agreement without change of beneficiary. The same month the parties were divorced, and within a year after entering into the contract Charles F. Naylor died, leaving four payments, amounting to the sum of $300, due as alimony under the agreement. The policy of insurance of $1,000 mentioned in the agreement was allowed by the decedent to lapse. The action was brought to recover the amount of these two items.

Plaintiff alleged that she had fully and faithfully performed all things by her to be performed under the terms of the contract, and that her deceased husband had not performed his part of the contract. These allegations were denied. The issue thus presented was whether or not plaintiff had failed to perform her obligation under the contract. It was claimed by defendant that plaintiff had retained possession of certain household furniture after the execution of the agreement. Plaintiff claimed that the furniture was not community property, but, on the contrary, that the same was her separate property, having been acquired by her as a gift from her husband prior to the entering into of the agreement. The question of whether or not plaintiff performed her part of the agreement depended on the character of the property in question. The case was tried before a jury, and judgment was entered thereon in the sum of $1,300.

[1-3] Appellant here claims that there is no evidence in the record to show that plaintiff has sustained the burden of proving that she had performed her part of the agreement. There is no merit in the contention. The evidence shows that the husband had made a gift to his wife of the furniture in question prior to the entering into of the agreement, and had personally assisted her in removing it from the apartment where they were both living to an apartment she had rented for herself where she lived alone. The evidence is sufficient to show full performance on the part of plaintiff. Appellant further claims that the trial court committed prejudicial error when it failed to submit to the jury, under appropriate instructions, the issue of whether plaintiff had performed her part of the contract sued upon. The trial court fully and fairly instructed the jury upon the issue involved. The jury was instructed in substance that it was for it to say whether or not the household furniture in the possession of plaintiff was or was not community property at the time she became possessed of it or whether her husband had made a gift of it to her. The jury was further instructed that, if it found plaintiff had refused to turn over to her husband any community property pursuant to the terms of the agreement, and if it found that she retained property not given to her by her husband, then defendant was to recover. These and other instructions fully covered the issue. No other questions are presented.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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2 Cal.App.2d 14

HOUSH v. PACIFIC STATES LIFE INS. CO.

Civ. 5074.

District Court of Appeal, Third District, California.

Nov. 5, 1934.

Hearing Denied by Supreme Court Dec. 17, 1934.

1. Insurance ⚷665(5)

In action on accident policy excepting loss from suicide or intentionally inflicted injury, introduction of policy *held* to establish prima facie case for beneficiary, though insured was found dead of gunshot wound with companion who shot himself, since death would be presumed accidental rather than result of suicide or murder.

2. Trial ⚷419

Alleged error in denying nonsuit was waived by defendant in proceeding to trial.

3. Insurance ⚷464

Accident policy excepting loss resulting from intentionally inflicted injuries *held* not to exclude injury or death intentionally inflicted by another.

4. Insurance ⚷146(3)

Ambiguity in insurance policy is resolved against insurer.

5. Insurance ⚷665(5)

Beneficiary *held* entitled to recover on accident policy excepting loss from suicide or intentionally inflicted injuries where insured was found dead of gunshot wound with companion who shot himself, and no evidence of struggle or quarrel appeared, since presumption obtained that death was accidental rather than result of criminal act (Code Civ. Proc. § 1963, subds. 2, 3).

◆

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Alice Housh against the Pacific States Life Insurance Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

J. F. Riley, of San Francisco, for appellant.

Neumiller & Ditz, E. E. Breitenbucher, and Charles H. Epperson, all of Stockton, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This appeal is from a judgment in favor of plaintiff and involves the interpretation and construction of a policy of insurance. The facts are not in dispute and are briefly that plaintiff was the mother of John D. Housh, and the beneficiary under the policy of insurance here in controversy, wherein defendant agreed to pay to plaintiff a specified sum for the loss of life of John D. Housh resulting directly and independently of other causes from accidental injuries.

Housh and one Luke Abel together occupied a house near the outskirts of the city of Stockton. Abel was a cripple and although he could walk to some extent, usually got about by the use of a wheel chair.

On the morning in question the sheriff's office was notified that there was something wrong at the house of Abel and Housh. A deputy sheriff immediately responded and upon entering the house found Housh lying in a pool of blood in the kitchen. He was suffering from a gunshot wound in the back of the head and died in a few hours from the effect thereof without regaining consciousness. Some distance away, but in the same room, Abel was lying dead on the floor. A double-barreled 12-gauge shotgun was lying near Abel with both barrels discharged. Circumstances indicated that Abel had shot himself through the heart. It was also apparent and not disputed that Abel had shot Housh and then killed himself. Whether the shooting of Housh was accidental or deliberate on the part of Abel is one of the questions to be here determined and upon that must depend the outcome of this appeal.

The provisions of the policy of insurance applicable to this question are, after reciting that in consideration of the payment of premiums, the company insured Housh against—

"*Insuring Clause* (A) Loss of Life, limb, sight or time, the cause of which originates and disability begins while this policy is in full force and effect, which loss results directly and independently of all other causes, from accidental bodily injuries, hereinafter called 'such injury', * * *

"*Accident Indemnity—Specific Losses* Part 2. If the Insured shall sustain accidental bodily injuries as described in the insuring clause, and 'such injury' shall, independently and exclusively of disease and all other causes, immediately, continuously and wholly disable the Insured from the date of the occurrence of the accident and result in any of the following specific losses within ninety days thereafter, the Company will pay, in lieu of all other indemnity: For Loss of Life—The Principal Sum."

Under the heading "*Additional Provisions*" appears this clause: "This policy does not cover any loss resulting from * * * suicide, sane or insane, or any attempt thereat, or intentionally inflicted injuries."

[1] It was the finding of the trial court that the death of Housh was caused by an accidental bodily injury inflicted upon him from a firearm discharged by another. Upon the trial, plaintiff introduced the policy of insurance and rested. Whereupon defendant moved for a nonsuit, the denial of which constitutes appellant's first ground for reversal. Without dwelling at length upon the merits of this point, we are of the opinion the allegations of the complaint and the admissions of the answer together with the presumptions applicable thereto established a prima facie case for plaintiff.

In the case of Jenkin v. Pacific, etc., Ins. Co., 131 Cal. 121, 63 P. 180, 181, the insured was killed by a gunshot wound and the only evidence as to the cause of death was the position of the wound itself. In that case the court said:

"There is nothing, perhaps, in the character or location of the wound to indicate from a mere inspection of it that it was inflicted accidentally, rather than willfully; but when we consider that it is contrary to the general conduct of sane men to take their own lives, and that all the presumptions are in favor of sanity and against crime, we are impelled to the conclusion that the insured must have received his injury as the result of an accident. In the absence of evidence to that effect, it will not be presumed that the insured purposely took his own life, nor that he was murdered; and, if he did not take his own life willfully, and his life was not taken by another under circumstances making it a crime, then, we think, his death must be attributed to accidental causes. Richards v. Travelers' Ins. Co., 89 Cal. 170, 26 P. 762 [23 Am. St. Rep. 455]. That the courts will presume that the death was the result of an accident, when nothing more is shown than that it was brought about by a violent injury, and the character of such injury is consistent with the theory of accident, seems to be a rule upheld by the great weight of authority." (Citing cases.)

In Mah See v. North American, etc., Co., 190 Cal. 421, 213 P. 42, 44, 26 A. L. R. 123, the court also said:

"Of course, the burden was upon the plaintiff to prove by a preponderance of the evidence that the death resulted 'through accidental means,' as provided in the body of the policy. But this burden was fully met when it was shown, without contradiction, that the shooting did not follow as a natural or probable result from anything done by the insured. Richards v. Travelers' Ins. Co., 89 Cal. 170, 175, 26 P. 762, 23 Am. St. Rep. 455; Jenkin v. Pacific, etc., Ins. Co., 131 Cal. 121, 63 P. 180; Price v. Occidental Life Ins. Co., 169 Cal. 800, 802, 147 P. 1175. But, on the issue raised by the claim of the defendant that the insured died as the result of 'injuries intentionally inflicted' on him, the burden of proof rested upon the defendant. Postler v. Travelers' Ins. Co., 173 Cal. 1, 3, 158 P. 1022."

Appellant relies principally upon the cases of Ogilvie v. Ætna Life Ins. Co., 189 Cal. 406, 209 P. 26, 26 A. L. R. 116; Rock v. Travelers' Ins. Co., 172 Cal. 462, 156 P. 1029, L. R. A. 1916E, 1196; Price v. Occidental Ins. Co., 169 Cal. 800, 147 P. 1175; and Postler v. Travelers' Ins. Co., 173 Cal. 1, 158 P. 1022. Examination of these cases shows that in the cases of Ogilvie v. Ætna Life Ins. Co., and Rock v. Travelers' Ins. Co., there was no external signs of injury, and therefore plaintiff, as a part of his case, would be required to establish the cause of death. In Price v. Occidental Life Ins. Co., no evidence was given, the appeal being on the judgment roll and the case is not an authority on the question here at issue. In Postler v. Travelers' Ins. Co., the death of the insured was brought about by an attempt by him to force a gambling house to pay money over at the point of a gun. In an encounter with one of those connected with the gambling house, an exchange of shots was fired resulting in the death of the insured. The court held the death of the insured was a natural consequence of his actions and was not an accident within the meaning of the policy. The burden was clearly upon the plaintiff under such circumstances to maintain the issue as to whether or not the death of the insured had been effected through accidental means.

[2] As a further answer to appellant's argument as to the error of refusing his motion for a nonsuit, he cannot now be heard to complain inasmuch as the error, if any, in refusing the motion was waived by appellant proceeding to trial. 9 Cal. Jur. 564, and cases there cited. In Morgan v. McIntyre, 113 Cal. App. 626, 299 P. 116, 117, the court said:

"By presenting evidence after the denial of her motion, appellant changed the question for decision from the correctness of the ruling on her motion to the sufficiency of the whole evidence to support the judgment."

Another question raised by appellant is whether the following language in the policy refers to injuries inflicted by the insured or by another: "This policy does not cover any loss resulting from * * * suicide, sane or insane, or any attempt thereat *or intentionally inflicted injuries.*" (Italics ours.)

[3, 4] Was it the purpose to exclude from the benefits of the policy an injury or death intentionally inflicted by another? With the contention of appellant supporting the affirmative of this construction, we cannot agree. This policy was a contract entered into between the company and the insured and any acts or conduct therein prohibited would logically refer to the acts of the parties to the contract and in the case of ambiguity in a policy of insurance as has often been said, such uncertainty is resolved against the insurer. 14 Cal. Jur. 443.

In Button v. American Mutual Accident Ass'n, 92 Wis. 83, 53 Am. St. Rep. 900, 65 N. W. 861, the insured was injured by the intentional discharge of a gun by a person unknown. The policy protected against death or injuries through external, violent, and accidental means but contained an exception against intentional injuries. There the court, in considering this language, said:

"* * * But here the words are simply 'intentional injuries,' and the question is, whose intention is referred to? We think it must be held that the word 'intentional,' as here used, refers to the insured alone. The words, 'intentional injuries,' are in close connection with a long list of injuries, all of which import more or less of intent, consent, or participation by the insured, and are evidently excluded because of such intent, consent, or participation; the idea evidently being that the risk should be one which the insured cannot, by intent or consent, or by his own act, produce or hasten. Had it been the intention to exclude another class of injuries, namely, those inflicted intentionally by a third person only, it would have been easy to do so by a very few plain words. In the absence of such words, we construe the words under the familiar rule of 'noscitur a sociis.' The plaintiff was entitled to the judgment which he recovered. Judgment affirmed."

In the instant case the injuries sustained by the insured resulted in his death. In accordance with the rule of strict construction. a line of well-considered cases hold that when a policy insures against intentional "injuries," a death resulting therefrom is not exempted. In Kascoutas v. Federal Life Ins. Co., 193 Iowa, 343, 185 N. W. 125, 22 A. L. R. 294, it was held that where a policy insured against accidental death and disability with a provision that it did not cover a disability resulting from intentional injuries inflicted by insured or another, the company must pay where the insured was intentionally killed by a third person. In Interstate Business Men's Accident Ass'n v. Dunn, 178 Ky. 193, 198 S. W. 727, 6 A. L. R. 1333, the policy contained a provision wherein the association agreed to pay the face of the policy in case of death of the insured from bodily injuries effected solely through external, violent, and accidental means. There is also a clause excepting any loss due to the act of any person "done to injure the insured." The insured was intentionally murdered and in an action against the company to enforce payment the court held that the failure of the policy to use the word "death" in the excepting clause, rendered the company liable.

In Provident Life & Accident Insurance Co. v. Johnson (Tex. Civ. App.) 235 S. W. 650, the policy provided for insurance "from disability or fatal injury" and provided that if said "disability" resulted from the intentional act of the insured or any other person, the company would not be liable. The insured was killed by another and the company was held liable under the rule of strict construction, since "disability" and "fatal injury" have distinctly different meanings.

In American Accident Co. of Louisville v. Carson, 99 Ky. 441, 36 S. W. 169, 34 L. R. A. 301, 59 Am. St. Rep. 473, it was held that where a policy insures against death or injury by external, violent, and accidental means, a provision that it shall not cover intentional "injuries" refers only to nonfatal injuries.

In Business Men's Indemnity Ass'n v. Washburn, 94 Ind. App. 395, 157 N. E. 104, 158 N. E. 492, it was held that where in an accident insurance policy the exception clause referred to injuries intentionally inflicted and did not contain the word "death," the court must assume that the word "death" was omitted for some good and sufficient reason. There also was a provision excepting liability as to injuries intentionally inflicted by insured or any other person, a beneficiary was entitled to recover for the death of insured resulting from being intentionally shot and injured by another, since such exemption clause deals with injuries only, and it cannot be said that exemption from death was intended thereby.

[5] Under the facts in the instant case where all that appears is the death of the insured by a gunshot wound and the suicide of the companion, no evidence of a struggle or a quarrel appearing, the law relying upon a presumption of innocence will hold death was accidental rather than the result of a criminal act.

Appellant calls our attention to presumptions other than that of innocence, namely: "That a person intends the ordinary consequences of his voluntary act" (section 1963, subd. 3, Code Civ. Proc.), and, "That an unlawful act was done with an unlawful intent" (section 1963, subd. 2, Code Civ. Proc.). He argues that in order for the gun to kill deceased, it must have been pointed at him, the safety released, the hammer raised, the trigger pulled. All these acts, and particularly the discharge itself, could have been the result of an unavoidable accident in which no act or blame of Abel could be charged, in which case the presumptions referred to by appellant would not be applicable. The presumption of innocence still seems to be the only presumption in which to make applicable it is not necessary to assume some act of Abel.

From the foregoing, it appears that the judgment of the court should be affirmed, and it is so ordered.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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2 Cal.App.2d 81

BUNCH et al. v. KIN et al.

Civ. 5153.

District Court of Appeal, Third District, California.

Nov. 7, 1934.

Rehearing Denied Dec. 7, 1934.

Hearing Denied by Supreme Court Jan. 3, 1935.

1. Automobiles 🔑19

Purpose of statute requiring registration of motor vehicles is to provide means whereby ownership of vehicle may be readily ascertained (St. 1931, p. 2105, § 45¾).

2. Automobiles 🔑19

Certificate of registration of motor vehicle is not evidence of ownership or title, but is merely a means of identification (St. 1931, p. 2105, § 45¾).

3. Automobiles 🔑192(8)

Conditional buyer in possession of automobile had, by nature of contract, seller's permission to use automobile so as to make applicable statute imposing liability upon owner for personal injuries or property damage caused by negligent operation of motor vehicle by person operating vehicle with permission of owner (Civ. Code, § 1714¼).

4. **Automobiles** ⚷192(8)

Conditional seller of automobile who failed to notify division of motor vehicles of sale or to have new certificate of ownership issued in which buyer was named as legal owner *held* liable to person injured through operation of automobile by buyer (Civ. Code, § 1714¼; St. 1925, p. 414, § 153; St. 1929, p. 514, § 45; St. 1931, p. 2105, § 45¾).

◆

Appeal from Superior Court, Amador County; A. Caminetti, Jr., Judge.

Action by Arthur Bunch and others against J. G. Kin and J. E. Votaw. Judgment for J. E. Votaw and against plaintiffs, and, from the order denying a motion to vacate the judgment and from the judgment, plaintiffs appeal.

Judgment and order reversed, and judgment ordered entered against J. E. Votaw in the same amount that was rendered against J. G. Kin.

Hearing denied by Supreme Court; PRESTON and LANGDON, JJ., dissenting.

Nat Brown and J. A. Metzler, Jr., both of Stockton (**Scott Rex**, of Stockton, of counsel), for appellants.

James W. Hughes, of Oakland, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an action brought by plaintiffs against defendants for personal injuries sustained as a result of the negligent operation of an automobile driven by Kin, and which, according to the findings, was owned by J. E. Votaw, who had, some six months prior to the accident, transferred the car in question to J. G. Kin by an oral conditional sale. According to the terms of the agreement, title to the automobile was not to pass from Votaw to Kin until the full purchase price had been paid, which condition had not been fulfilled at the time of trial. Permission had, however, been given to Kin by Votaw to operate the car, and Kin was operating the car under the terms of the agreement at the time of the accident. The court further found that neither defendant had, prior to the accident, given any notice to the division of motor vehicles of any transfer or sale of the car, nor had any attempt been made to comply with the terms of section 45 of the California Vehicle Act (St. 1923, p. 524, as amended by St. 1929, p. 514) and section 45¾, as added by St. 1931, p. 2105.

The trial court entered judgment in favor of defendant Votaw and against plaintiffs, and, from the order denying a motion to vacate the judgment and from the judgment itself, this appeal is taken.

The rights of the parties hereto depend upon the meaning of section 1714¼ of the Civil Code, enacted in 1929 (St. 1929, p. 566), and section 45¾ of the California Vehicle Act, which was added to that act in 1931. That portion of section 1714¼ here pertinent is as follows: "Every owner of a motor vehicle shall be liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner. * * * If a motor vehicle be sold under a contract of conditional sale whereby the title to such motor vehicle remains in the vendor, such vendor or his assignee shall not be deemed an owner within the provisions of this section, but the vendee, or his assignee shall be deemed the owner notwithstanding the terms of such contract, until the vendor or his assignee shall retake possession of such motor vehicle."

Section 45¾ of the California Vehicle Act reads: "Whenever the owner of a motor vehicle registered under this act shall sell or transfer his interest in and the possession of said motor vehicle to another, said owner shall immediately notify the division of motor vehicles of such sale or transfer, giving the date of same, the names and addresses of such owner and of the transferee, and such description of the vehicle as may be called for in any official form provided for such purpose by the division; provided, however, that in the event said notice be given or in the event of failure to give said notice, an owner who has made a bona fide sale or transfer of such motor vehicle and delivered possession thereof to a purchaser and who has made proper endorsement and delivery of the certificate of ownership as provided in this act, shall not by reason of any of the provisions of this act be deemed the owner of such motor vehicle so as to be subject to liability under the provisions of section 1714¼ of the Civil Code of this state."

Section 153 of the California Vehicle Act (St. 1923, p. 565, as amended by St. 1925, p.

414) makes a violation of any of the provisions of section 45¾ a misdemeanor.

[1] Section 45¾ deals with the registration of motor vehicles. The object and importance of such registration is declared in the case of Parke v. Franciscus, 194 Cal. 284, 228 P. 435, 438, wherein it is said: "The nature of motor vehicle traffic requires that there be a more certain indicia of ownership than mere possession, for the protection of the general public in case of accidents or violations of the law and to prevent fraud upon innocent purchasers. In order to effectuate this purpose, registration and identification of motor vehicles is required. The 'legal owner' and the 'registered owner' upon the face of the certificate identify the vehicle. Upon the sale and transfer of 'ownership' in a vehicle already registered, the act requires the transferor and transferee to enter into a joint statement of the transfer, indorsed upon the reverse side of the certificate of registration. It is also provided that the legal owner sign such statement which shall be forwarded to the department, and upon the payment of a fee the vehicle shall be registered in the name of the transferee. This provision is evidently for the purpose of identifying the vehicle in the hands of transferees. The identity and ownership of cars operated upon the public ways is of concern to the state."

It is obvious that the purpose of the Legislature in enacting section 45¾ of the California Vehicle Act was to provide the means whereby it could be readily ascertained who the owner might be. To admit evidence of oral conditional transfers of title of motor vehicles would make the ascertainment of that fact a difficult matter at least, susceptible of confusion and concealment.

[2-4] It is the contention of respondent that section 45¾ of the California Vehicle Act does not refer to conditional sellers but to unconditional sellers only, and in support of his analysis of the section, relies largely upon the use of the words "certificate of ownership" in the proviso thereto. Respondent claims that only an unconditional seller would deliver the certificate of ownership, whereas the conditional seller would retain such indicia of ownership until payment in full. Respondent also refers to the language of section 1714¼ of the Civil Code which he claims excludes conditional sellers from the operation of the section, and cites Swing v. Lingo, 129 Cal. App. 518, 19 P.(2d) 56, to the effect that section 1714¼, being penal in its nature, should receive a consideration that would exclude from liability those not definitely coming within the provisions of the act. Having in mind the legislative purpose, however, as we gather such purpose to be, the construction contended for by respondent is too restricted.

It is apparent from an examination of section 45¾ of the California Vehicle Act that it applies to every sale or transfer, both conditional and absolute. Neither can the use of the words "certificate of ownership" without referring to "certificate of registration" have the effect upon the construction which respondent desires here to apply. It must be recalled that a certificate of registration is not evidence of ownership or title; it has no value as such; it is merely a means of identification. Its use therefore would not be logical in the sections cited, which is considering ownership and not mere identification. It may be true that in section 45¾ of the California Vehicle Act two methods are provided whereby a vendor in an absolute sale may escape liability under section 1714¼ of the Civil Code, namely, by the giving of notice to the division of motor vehicles, and by the indorsement and delivery of the certificate of ownership, while only one method is available to a conditional vendor, that is, the giving of the required notice. Yet this limitation arises not from the failure of the Legislature to make other provisions, but from the very nature of a conditional sale, which prevents the use of any other means than the giving of notice by the vendor, without destroying the effectiveness of the conditional sale.

Section 1714¼ of the Civil Code places liability for negligence of the operator of a motor vehicle upon the owner whose car is being operated with his permission; the word "owner" therein referring to "registered owner." Section 1714¼ of the Civil Code, however, exempts from such liability those who are "legal owners." Those liable therefore are the registered owners, who have not by compliance with section 45¾ of the California Vehicle Act removed themselves from such classification. It is clear, therefore, that the words "whereby the title remains in the vendor" in section 1714¼ of the Civil Code refer to one who, by compliance with the California Vehicle Act, has retained the bare legal title and passed the registered ownership to another.

Respondent also claims that no liability attaches to him under section 1714¼ of the Civil Code because it does not appear that Kin was operating the car with the permission, express or implied, of such owner. The findings of the court upon this question are that the defendant Kin "operated the said Chevrolet automobile under the terms of said agreement." One of the distinct features of a conditional sales agreement is that title is retained by the seller as security for the payment of the purchase price, and that possession of the property is delivered to the buyer who is entitled to possession and use of the goods until default in payment.

As conditional vendee in possession, Kin "had the right to use the car in the way in which such property is customarily used, and for all reasonable purposes." Pacific States Finance Corporation v. Freitas, 113 Cal. App. (Supp.) 757, 295 P. 804. Respondent, therefore, by the very nature of his agreement, gave Kin permission to use the car for any purpose for which it was suitable or fit to be used, which permission was irrevocable so long as respondent did not reclaim possession of the car because of some breach of the terms of the agreement by Kin. Having in mind, therefore, that the evident purpose of the Legislature was that a public record of the evidence of ownership of automobiles used on the public highways was to be kept, not merely for revenue purposes alone, but for the protection of persons who may be injured by the negligent use thereof, the registration of such vehicles is required. In furtherance of this object and to eliminate disputes as to the liability of an owner, the Legislature in 1929 enacted section 1714¼ of the Civil Code, fixing a limited liability on every owner of a motor vehicle operated with his permission, express or implied, subject to an exception in favor of conditional sale vendors and chattel mortgagors. In order to protect a vendor, the Legislature in 1931 enacted section 45¾ of the California Vehicle Act, which provides that the owner may relieve himself from liability either by notifying the department of motor vehicles of the sale, or by indorsement and delivery of the certificate of ownership to the purchaser. In the case of a conditional sale, as is the case at bar, the seller, in order to escape liability as owner, had first either to give notice of the sale to the division of motor vehicles under section 45¾ of the California Vehicle Act, or to see that the requirements of section 45 of the same act were complied with, namely: That a new certificate of ownership be issued in which he is named as legal owner. Until one or the other of these things were done, the former owner, so far as liability to a third person is concerned, continued to be the owner.

It is therefore the order of this court that the judgment and order appealed from be reversed, and that judgment be entered against respondent J. E. Votaw in the same amount that was rendered against defendant J. G. Kin.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

GINDRAUX et ux. v. MAURICE MERCANTILE CO.*

Civ. 9277.

District Court of Appeal, First District, Division 2, California.
Nov. 16, 1934.

Hearing Granted by Supreme Court
Dec. 13, 1934.

1. Sales 🔑274

Statutory warranty of provisions for domestic use does not apply to sales of foodstuffs in original cans or sealed packages from manufacturer, where seller has no means of knowing condition of contents by exercise of skill, industry, or investigation (Civ. Code 1872, § 1775).

2. Statutes 🔑222

Statute in affirmance of common-law rule will be construed as to its consequences in accordance with such law, and when words of definite signification therein are used in such provisions, and there is no intention manifest that they are to be taken in different sense, they are to be deemed employed in their known and defined common-law meaning.

3. Statutes 🔑188, 215

Statutes are to be read in light of attendant conditions and state of law existent at time of their enactment, and words thereof must be taken in sense in which they were understood when statute was enacted.

4. Statutes 🔑181(2)

All laws should receive sensible construction and general terms should be so limited in their application as not to lead to injustice, oppression, or absurd consequences and it will be presumed that Legislature intended exceptions to its language which would avoid results of such character.

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 47 P.2d 708.

5. Statutes ⟹181(2)

When statute is fairly susceptible of two constructions, one leading inevitably to absurdity, and other consistent with justice, sound sense, and wise policy, former should be rejected and latter adopted.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

On petition for rehearing.

Petition denied.

Prior opinion, 36 P.(2d) 844.

Glensor, Clewe, Schofield & Van Dine, of San Francisco, for appellants.

Joseph E. Bien and Werner Olds, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

Appellants, in their petition for a rehearing, criticize the opinion herein because it did not discuss the provisions of section 1775 of the Civil Code as they existed at the time of the sale. This section which was adopted in 1872, read: "*Warranty of Provisions for Domestic Use.* One who makes a business of selling provisions for domestic use warrants by a sale thereof, to one who buys for actual consumption, that they are sound and wholesome."

[1] We take the view that the section did not apply to sales of foodstuffs in original cans or sealed packages from the manufacturer where the seller had no means of knowing the condition of the contents by the exercise of any skill, industry, or investigation. Our reasons for this view are that the Code section was but an adoption of the common-law rule existing in 1872 when such sales were unknown to the law and to the trade. When the Code section was enacted, the common-law warranty was based on the theory that "one who makes a business of selling provisions for domestic use" either prepared the provisions for sale or handled them in bulk in such a manner that he had "an opportunity to observe and inspect the appearance and quality of the food products" (11 R. C. L., page 1124) and he was accordingly charged with knowledge of their imperfections. But there was nothing in the common-law rule of the time which by any possible inference could have extended the rule to the retailer of these sealed packages where he had no means of inspection. And there is nothing in the Code section which will warrant an interpretation that the Legislature meant to extend its provisions beyond the common-law rule.

[2, 3] It is a cardinal rule of interpretation that "a statute in affirmance of a rule of common law will be construed, as to its consequences, in accordance with such law. * * * When words of definite signification therein are used in such provisions, and there is no intention manifest that they are to be taken in a different sense, they are to be deemed employed in their known and defined common-law meaning." Lewis' Sutherland Statutory Construction (2d Ed.) vol. II, § 455. "Statutes are to be read in the light of attendant conditions and the state of the law existent at the time of their enactment. The words of a statute must be taken in the sense in which they were understood at the time when the statute was enacted." 25 R. C. L., p. 959. To the same effect is People v. Barnett, 319 Ill. 403, 150 N. E. 290, where it was held that a statute of 1874, providing for a jury list to be made from "the legal voters," did not permit the inclusion of women as jurors after they had been given the right to vote by the constitutional amendment of 1920, but that the statute must be construed to refer to male electors as the word was used when the statute was enacted. State v. Boston & M. R. Co., 123 Me. 48, 121 A. 541, follows the rule in holding that a statute of 1881, relating to taxation of "railroads," did not include street railroads as they were unknown to the Legislature when the statute was enacted.

[4] Another rule of construction which is supported by an unbroken line of authority is that found in the expression of Mr. Justice Field in United States v. Kirby, 7 Wall. 482, 486, 19 L. Ed. 278: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter." To the same effect are Lewis' Sutherland Stat. Constr. (2d Ed.) vol. II, §§ 488, 489; People v. Ventura Ref. Co., 204 Cal. 286, 291, 268 P. 347, 283 P. 60; Robbiano v. Bovet, 218 Cal. 589, 596, 24 P.(2d) 466.

[5] If we could assume that the Legislature of 1872 intended to include in the act the retailer of sealed packages who sells direct from the manufacturer without possi-

bility of inspection as is the custom of modern trade, then we would have to hold that the Code section is, to that extent, unreasonable and void, because the construction which the appellants would have placed on the section would be so unjust and oppressive that no reliable and responsible seller could deal in such goods. The consequent result of such construction would be a detriment and hardship to the public in general with no corresponding benefit. When a statute "is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity, and the other consistent with justice, sound sense, and wise policy, the former should be rejected, and the latter adopted." In re Mitchell, 120 Cal. 384, 386, 52 P. 799, 800.

The petition for a rehearing is denied.

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2 Cal.App.2d 281

PEOPLE v. PETRILLE.

Cr. 175.

District Court of Appeal, Fourth District, California.

Nov. 19, 1934.

1. Criminal law 🔑1186(4)

In prosecution for two offenses of incest, that defendant's wife was permitted to testify over defendant's objection *held* not prejudicial, where wife's testimony concerned offense for which defendant was acquitted, although both offenses were alleged to have been committed with defendant's daughters (Const. art. 6, § 4½; Pen. Code, § 1322).

2. Criminal law 🔑655(5), 1035(3)

Statement of trial court that he believed jury would arrive at verdict without being hampered or mixed around by attorneys *held* not error, where statement was made in response to suggestion of defendant's counsel that jury could arrive at verdict without assistance of argument by counsel and no objection was made to trial court's statement.

3. Criminal law 🔑798½

Instruction that jury could disagree on verdict as to one count but could render verdict on count on which it agreed *held* not error because meaning of instruction was that jury might not reach unanimous agreement as to one offense but that it could return verdict of conviction or acquittal as to other offense if unanimous agreement could be reached thereon.

Appeal from Superior Court, Fresno County; Arthur Allyn, Judge.

Philip Petrille was convicted of incest, and he appeals.

Affirmed.

Frank Curran, L. B. Fowler, J. G. Crichton, and Tom Okawara, all of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

JENNINGS, Justice.

The information against the defendant filed by the district attorney of Fresno county contained four counts. In the first count the defendant was charged with having committed the offense of statutory rape; in the second count the defendant was charged with having committed the crime of incest with his daughter Elsie Petrille on March 24, 1934; in the third count he was charged with having committed the crime of lewd and lascivious conduct with and upon the aforesaid daughter on the aforesaid date; in the fourth count he was charged with having committed the crime of incest with another daughter, Josephine Petrille, in the month of October, 1931.

On arraignment the defendant pleaded that he was not guilty of the offenses charged against him and the cause was set for trial. At the time appointed for the trial and prior to the introduction of any evidence in the case the district attorney moved that the action be dismissed as to the first and third counts. The motion was granted and the case proceeded to trial on the allegations contained in the second and fourth counts and the defendant's plea of not guilty thereto. Upon the conclusion of the trial the jury returned a verdict finding the defendant guilty of the offense charged in the second count of the information and not guilty of the offense charged in the fourth count. Defendant's motion for a new trial was denied, as was also his application for probation, and the trial court pronounced judgment upon him whereby it was ordered that as punishment for the offense of which he was convicted he should be confined in the state prison at San Quentin. From the judgment thus pronounced and from the court's order denying his motion for a new trial, the defendant has prosecuted this appeal.

[1] In support of his appeal the defendant contends that the trial court committed reversible error in permitting his wife to testify without his consent and over his express objection thereto. The action of the trial court in so doing is said to be in direct contravention of section 1322 of the Penal Code wherein it is provided that neither husband nor wife is a competent witness for or against the other in a criminal action to which either or both are parties, except with the consent of both, or in cases of criminal violence upon one by the other or upon the child or children of one by the other. It is urged that criminal violence is not an element of the crime of incest in accordance with the opinion rendered in People v. Stratton, 141 Cal. 604, 75 P. 166, and that therefore the wife was not a competent witness against her husband and the admission of her testimony was erroneous and fatally prejudicial to the defendant's right to a fair trial.

With respect to this contention it is conceded, and an examination of the record discloses the propriety of the concession, that the testimony of the wife related solely to the charge of incest contained in the fourth count of the information, of which the defendant was acquitted. We think, therefore, that it is not necessary to decide whether or not the court erred in permitting the wife to testify against her husband. A painstaking examination of the entire record herein has entirely failed to produce the conviction that the admission of the wife's testimony resulted in a miscarriage of justice. We are not, therefore, warranted in sustaining the defendant's contention and in reversing the judgment for the asserted error (section 4½, art. 6, Constitution of California). The facts that the testimony of the wife related solely to the alleged commission of incest with the defendant's daughter Josephine in October, 1931, and that the defendant was acquitted of this offense by the jury are strongly indicative of a lack of prejudice resulting to the defendant from the admission of the wife's testimony, assuming that its reception was erroneous.

Defendant urges that the two offenses for whose commission he was placed on trial were so interrelated that all evidence which was produced related to and bore upon both, and that therefore the wife's testimony, although it had to do only with the crime of incest charged in the fourth count of the information, nevertheless had a bearing on the offense charged in the second count, and that it necessarily prejudiced the jury against the defendant. With this contention we cannot agree. Other than the fact that the offenses charged were both incest alleged to have been committed with defendant's daughters the two crimes were entirely separate offenses alleged to have been committed with different persons on different dates, widely separated in time.

[2] The defendant also complains that his right to a fair trial was seriously infringed by a certain statement made by the trial court in the presence of the jury. The criticized statement is as follows: "I will say in all sincerity, I think they will arrive at a verdict without being hampered or mixed around by the attorneys." The contention with respect to this statement appears to be that it carried a strong implication that the court thought the jury should agree upon a verdict and that if the statement had not been made the jury might properly have disagreed since the evidence was conflicting and a verdict of conviction would not have resulted.

The record shows that the criticized remark was made under the following circumstances: Upon the conclusion of the trial and after both the people and the defendant had rested, one of the defendant's counsel suggested in the presence of the jury that the question of the defendant's guilt or innocence be submitted to the jury without argument of counsel on either side. The final sentence of his statement was: "I think that they know they judge the credibility of witnesses and under the instructions of the court, I feel that they can arrive at a just and true verdict in this case without the aid of counsel." One of the deputy district attorneys representing the people then stated that he was willing to submit the cause to the jury without argument and concluded his statement with the sentence that "perhaps the jury would care for argument, perhaps not." The trial court then addressed the jury and requested that any member of that body should indicate a desire for discussion of the evidence by raising his hand. The record shows that no juror responded. The trial court then made the statement to which complaint is now presented and shortly thereafter proceeded to instruct the jury and to submit the cause to their consideration. No objection was raised to the statement at the time it was made and no motion that it be stricken was presented, nor was it requested that the jury be advised to disregard it. A recital of the foregoing circumstances surrounding the making of the statement presents a complete answer to defendant's contention. Defendant's counsel had himself suggested that the jury could arrive at a verdict without the assistance of an argument by the attorneys. The court's statement was no stronger and carried no greater implication that a unanimous verdict of guilt or innocence should be reached than did counsel's statement. The court's remarks certainly did not intimate that the court felt that a verdict of conviction should be returned by the jury. The statement was permitted to stand without objection or request that it be stricken or that the jury be instructed to disregard it. The objection now presented comes too late and is palpably an afterthought which has occurred after the jury did exactly what defendant's counsel felt that they would do, namely, arrive at a verdict. Unfortunately for defendant, the verdict was one of conviction rather than a hoped-for verdict of acquittal.

[3] Defendant's final contention is that the trial court committed reversible error in giving the following instruction: "You are instructed that the defendant in this case is charged in two counts in the information which has been read to you. I instruct you that you may find the defendant guilty on each count, as in the information alleged, or you may find the defendant not guilty as to each count therein alleged. I further instruct you that you may find the defendant guilty on one count and not guilty on the other count. You may disagree on a verdict as to one count, but you may render a verdict on the count on which you do agree."

The argument with respect to this instruction is identical with that which is presented in connection with the voluntary statement of the trial court which has heretofore been considered. It is urged that by it the jury was plainly advised that it might disagree in its verdict as to the offense alleged in one count of the information, but that it must render a verdict as to the offense specified in the other count. It is declared that the vice of the instruction is particularly apparent when taken in connection with the trial court's statement that he thought the jury would arrive at a verdict without being hampered by argument of counsel.

It would be an easy answer to defendant's contention thus presented to point to the fact that the record fails to show by whom the criticized instruction was requested and that in accordance with the familiar rule which requires a reviewing court to resolve all intendments in favor of a judgment we should assume that the defendant himself requested the instruction which he now attacks. We prefer, however, to consider the language of the instruction for the purpose of discovering whether or not it is fairly subject to the interpretation placed upon it by the defendant.

It is our opinion that, taking the instruction in its entirety, and regarding it as a part of the instructions given by the court, it is not fairly susceptible of the construction urged by the defendant. The jury was properly informed that the defendant was charged with the commission of two offenses by the two counts of the information and that he might be convicted of both offenses or acquitted of both or that he might be convicted of one and acquitted of the other. The final sentence of the instruction contains the only language which is subject to any criticism. By it the jury was told: "You may disagree on a verdict as to one count, but you may render a verdict on the count on which you do agree." It would be straining the language of this sentence too much to declare that thereby the jury was advised that it must in any event reach a verdict as to one count of the information. We think that the plain meaning of the language used by the court was that the jury might not be able to come to a unanimous agreement as to one offense but that it might return a verdict, whether of conviction or acquittal, as to the other offense, provided its members should reach a unanimous agreement thereon. It is significant that the record fails to indicate that the defendant was dissatisfied with this instruction when it was given or that, through his counsel, he voiced any protest or objection thereto or requested the court further to clarify the instruction. Obviously the defendant would have made no complaint if the verdict rendered had been one of acquittal rather than of conviction.

For the reasons stated the judgment and order from which this appeal has been taken are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

4 Cal.App.2d Supp. 775

PEOPLE v. LEWIS.

Cr. 1124.

Appellate Department, Superior Court, Los Angeles County, California.

Nov. 7, 1934.

1. **Statutes** ⚿159

Where two statutory provisions are in irreconcilable conflict, one latest in point of time will control.

2. **Criminal law** ⚿1206(4)

Later statute prescribing different punishment for an offense repeals former statute by implication.

3. **Automobiles** ⚿332

Penal Code punishing as misdemeanor offense of driving motor vehicle while intoxicated is no longer in force, in view of subsequent motor vehicle acts, except in regard to offenses not covered by such acts, such as driving of a motor vehicle on private grounds by one who is intoxicated (Pen. Code, § 367d; St. 1929, p. 537, § 112).

4. **Automobiles** ⚿351

Complaint for driving automobile while intoxicated, attempting to charge offense under Penal Code punishing such offense as a misdemeanor, but not showing whether offense charged occurred on a public highway, *held* not to charge an offense, in view that subsequent motor vehicle acts limit application of such Penal Code section to offenses such as driving motor vehicle on private grounds by one who is intoxicated (Pen. Code, § 367d; St. 1929, p. 537, § 112).

5. **Automobiles** ⚿351

Complaint attempting to charge offense under Penal Code punishing driving of motor vehicle while intoxicated *held* insufficient to charge an offense within jurisdiction of municipal court in view that possible penalty for violation of such Penal Code section is by imprisonment in the state prison, which requires that prosecution under such section shall be prosecuted as for a felony (Pen. Code, § 367d; St. 1929, p. 537, § 112).

◆

Appeal from Municipal Court of Long Beach; Fred Miller, Judge.

Paul J. Lewis was convicted of driving an automobile while intoxicated and of reckless driving, and he appeals.

Reversed and remanded in part with directions to dismiss, modified and affirmed in part.

Chris Wilson, of Long Beach, for appellant.

John K. Hull, City Prosecutor, and Fred N. Howser, Deputy City Prosecutor, both of Long Beach, for the People.

SHAW, Presiding Judge.

By count I of the complaint the defendant was charged with violation of section 367d of the Penal Code, which provides that "any person operating or driving an automobile, motorcycle or other motor vehicle who becomes or is intoxicated while so engaged in operating or driving such automobile, motorcycle or other motor vehicle shall be guilty of a misdemeanor." This section was adopted in 1911 and has not since been amended.

In 1913 an act designated as the "motor vehicle act" was passed, section 17 of which provided that "no intoxicated person shall operate or drive a motor or other vehicle upon any public highway within this state." St. 1913, p. 646. In 1915 this act was repealed and another act designated as the "Vehicle Act" was passed, which contained a section 17 identical with that just quoted from the act of 1913. St. 1915, p. 406. Section 17 of the act of 1915 was amended in 1917. St. 1917, p. 400, § 13. By these acts the violation of the provisions referred to was made a misdemeanor. In 1919, section 17 of the act of 1915 was again amended to provide that "no person who is under the influence of intoxicating liquor * * * shall operate or drive a motor or other vehicle on any public highway within this state," and to make a violation of this provision punishable by either a fine or imprisonment in the county jail or the state prison. St. 1919, p. 214. In 1923 the act of 1915 and its amendments were repealed and a new act known as the "California Vehicle Act" was passed. St. 1923, p. 517. Section 112 of this act was substantially the same as the 1919 amendment of section 17 of the act of 1915, both as to substance and penalty. In 1929 the prohibitory provision of section 112 of this act was amended to read in part, "It shall be unlawful for any person * * * who is under the influence of intoxicating liquor * * * to drive a vehicle on any public highway within this state," and the penalty was left as before; that is, either fine or imprisonment in county jail or state prison. St. 1929, p. 537. No further amendments have been made.

Thus it appears that all these provisions of the various vehicle acts are subsequent in point of time to section 367d of the Penal Code. It is also obvious that the former overlap the latter; both sets of provisions covering the driving of a motor vehicle on a public highway. The Penal Code section makes it unlawful for any person doing such driving to be intoxicated while doing so, and the present provision of the California Vehicle Act, like its immediate predecessors, makes it unlawful for any person who is under the influence of intoxicating liquor to do such driving. The phrase, "under the influence of intoxicating liquor," as used in the vehicle acts, is synonymous with the word "intoxicated" used in the Penal Code section. See People v. Dingle, 56 Cal. App. 445, 452, 453, 205 P. 705; People v. Ekstromer, 71 Cal. App. 239, 244, 245, 235 P. 69; People v. McKee, 80 Cal. App. 200, 205, 251 P. 675. There is no substantial difference between these two provisions. The fact that one of them makes it unlawful for an intoxicated person to drive, while the other forbids a driver to be intoxicated, affords no basis for any distinction between them. By both of them the concurrence of intoxication with the driving of a motor vehicle on a public highway make out the offense.

[1-3] In view of what we have just said, certain well-established rules make it clear that section 367d of the Penal Code can no longer be regarded as in force except in regard to offenses not covered by the vehicle acts, such as the driving of a motor vehicle on private grounds by one who is intoxicated. Where two legislative enactments punish exactly the same act, they are in conflict. People v. Schuster, 122 Cal. App. (Supp.) 790, 793, 10 P.(2d) 204; Ex parte Stephen, 114 Cal. 278, 282, 46 P. 86; In re Murphy, 190 Cal. 286, 290, 212 P. 30; In re Mingo, 190 Cal. 769, 771, 214 P. 850. Where two statutory provisions are in irreconcilable conflict, the one latest in point of time will control. Beneficial Loan Soc., Ltd. v. Haight, 215 Cal. 506, 512, 11 P. (2d) 857; Crooks v. People's Finance & Thrift Co., 111 Cal. App. (Supp.) 769, 773, 292 P. 1065; People v. Schuster, supra. A later statute prescribing a different punishment for an offense works a repeal of the former one by implication. People v. Tisdale, 57 Cal. 104.

This question appears never to have received consideration from any of the higher courts of this state. In People v. Collins, 195 Cal. 325, 344 et seq., 233 P. 97, People v. Lloyd, 97 Cal. App. 664, 670, 275 P. 1010, and People v. Aguilar (Cal. App.) 35 P.(2d) 137, 141, reference was made to the Penal Code section and to one or more of the Vehicle Act sections above cited, but no opinion was expressed regarding their effect on each other. In re Quitman, 116 Cal. App. 59, 2 P.(2d) 41, held, on habeas corpus, that a commitment issued under section 367d of the Penal Code, presumably in 1931, that being the year of the decision, was valid. However, the opinion makes no reference to section 112 of the Vehicle Act, nor does it show that the question now before us was either raised or considered. For all that appears, the complaint on which the commitment there was based may have charged some offense committed on private property and therefore still within the reach of section 367d. We cannot regard that case as authority against our conclusion.

[4] The complaint in the present case does not show whether the offense charged occurred on a public highway. The great majority of such offenses are committed there, and we do not think the provision of the Vehicle Act should be regarded as a mere exception to the Penal Code section, so as to uphold a complaint which does not state the place of the offense, and cast on the defendant the burden of proving that his acts occurred on a public highway. The tail should not be expected so to wag the dog. Moreover, the evidence shows that the acts complained of in this case did occur on a public highway and hence could be prosecuted only under the Vehicle Act.

[5] The complaint does not charge an offense under that act, and, if we could overlook this deficiency, in view of the sufficiency of the evidence to prove such an offense, we would be confronted with the difficulty that, by reason of the imprisonment in the state prison which is a possible penalty for violation of section 112, every such violation stands as a felony for every purpose up to judgment and must be prosecuted as a felony. People v. War, 20 Cal. 117, 120; People v. Collins, 195 Cal. 325, 347, 233 P. 97; Doble v. Superior Court, 197 Cal. 556, 577, 241 P. 852; Morris v. Moore, 61 Cal. App. 314, 320, 214 P. 995. Consequently this offense cannot be prosecuted in the municipal court, which has no felony jurisdiction, but is limited in criminal cases to misdemeanors.

The charge in count II is a violation of section 121, of the California Vehicle Act (St. 1923, p. 557, as amended by St. 1929, pp. 539, 540), commonly called reckless driving. We have examined the evidence, and, while it is conflicting, that given in behalf of the prosecution, with the possible inferences therefrom, is sufficient to uphold the verdict on this count.

The judgment on count I is reversed, and the cause is remanded to the municipal court with directions to dismiss said count. The judgment on count II is modified by striking therefrom the provision that "sentence on Count II to commence upon the expiration of sentence imposed this day on Count I," and as so modified it is affirmed.

We concur: BISHOP, J.; FOX, J.

2 Cal.App.2d 367

CALIFORNIA BANK v. KENOYER.

Civ. 8429.

District Court of Appeal, Second District, Division 1, California.

Nov. 21, 1934.

1. Guaranty ⇨6

Written offer to pay balance of judgment against third person on condition that judgment creditor forbear enforcement for specified period need not be accepted in writing, offer to pay not being conditional on promise to forbear, but on forbearance.

2. Guaranty ⇨16(4)

Offer to pay balance of judgment against third person on condition that judgment creditor forbear enforcement for specified period and acceptance of such offer and performance of conditions by creditor constituted valid contract based on valuable consideration, creditor's detriment of delaying proceedings for enforcement constituting "consideration" (Civ. Code, § 1605).

[Ed. Note.—For other definitions of "Consideration," see Words & Phrases.]

3. Guaranty ⇨94

Judgment against wife on guaranty agreement was not erroneous because creditor already had judgment against husband for same amount, on theory that creditor was in position to collect on each of judgments, since satisfaction of one would extinguish the other.

4. Guaranty ⇨77(2)

Agreement to pay balance of judgment against third person on condition that judgment creditor forbear enforcement for specified period was guaranty agreement, on which suit could be brought without first exhausting legal remedies against principal debtor.

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the California Bank against Winnie V. Kenoyer. From an adverse judgment, defendant appeals.

Affirmed.

Willis S. Mitchell, of Los Angeles, for appellant.

Swanwick, Donnelly & Proudfit and Donald O. Welton, all of Los Angeles, for respondent.

SHINN, Justice pro tem.

Plaintiff, California Bank, recovered judgment against defendant and appellant upon the following agreement: "Los Angeles, California, February 7th, 1931. California Bank: In consideration of your forbearing to take any further action until February 25th, 1931 to realize upon the judgment heretofore entered in the case of California Bank vs. S. A. Kenoyer, which was entered on January 10th, 1931 in Judgment Book 657, Page 137 in the office of the County Clerk of Los Angeles County, California, the undersigned hereby guarantees payment to you on said February 25th, 1931 of the full amount unpaid on said judgment, the amount of said judgment as originally entered being nine thousand two hundred thirty one and 86/100 dollars ($9,231.86), and the unpaid amount thereon as of this date being three thousand thirty five and 21/100 dollars ($3,035.21). Winnie V. Kenoyer."

The issues raised by defendant's answer, upon which trial was had and findings made adverse to the claims of defendant, were the following: That the agreement was an offer by defendant not accepted by plaintiff; that the agreement was without consideration; and that its execution by defendant was procured by threats of plaintiff to levy execution against defendant's separate property upon the judgment plaintiff held against defendant's husband. The same points are urged for reversal of the judgment.

[1] The writing is a definite offer to pay the balance of the judgment upon condition that the judgment creditor forbear action for a specified period to enforce collection of the judgment. This offer was not revoked by defendant and it therefore stood as a continuing offer between February 7 and February 26, 1931. It was not necessary that the offer be accepted in writing. The offer to pay was not conditional upon a promise to forbear, but upon actual forbearance for a stipulated time. The finding of the trial court was that plaintiff took no action for the collection of the judgment between the 7th and 26th days of February, 1931, and duly performed all the conditions of said guaranty agreement on its part. The sufficiency of the evidence to support this finding is not questioned. The creditor suffered the detriment of delaying proceedings for the enforcement of the judgment, which alone constituted a consideration for the promise. Section 1605, Civ. Code.

[2] The offer of defendant and its acceptance and the performance of the conditions thereof by plaintiff constituted a valid and binding contract based upon a valuable consideration. R. H. Herron Co. v. Flack, 46 Cal. App. 374, 189 P. 294.

The court found that defendant did not sign the agreement under compulsion, force, fear, menace, or threats and that it was not true that she was led to believe that she would suffer the loss of her separate property if she failed to sign the guaranty. The evidence supports this finding. The only alleged compulsion complained of was the alleged threat of the creditor to levy execution against the separate property of defendant, but inasmuch as the finding on this issue is adverse to defendant, it is unnecessary to pass upon the sufficiency of the facts pleaded as a defense to the action.

[3, 4] Appellant argues that the judgment against her is erroneous because the creditor already has a judgment against her husband for the same amount and is thus in a position to collect on each of the judgments. We see no merit in this contention inasmuch as the satisfaction of one judgment will extinguish the other. Anglo-California Trust Company v. Oakland Railways, 193 Cal. 451, 225 P. 452; Rice Securities Co. v. Daggs, 63 Cal. App. 273, 218 P. 484. The agreement was clearly one of guaranty, upon which suit could be brought without first exhausting legal remedies against the principal debtor.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

* * *

2 Cal.App.2d 258

ROSS v. HIERONYMUS et al.

Civ. 9039.

District Court of Appeal, First District, Division 2, California.
Nov. 16, 1934.

Rehearing Denied Dec. 15, 1934.
Hearing Denied by Supreme Court Jan. 14, 1935.

1. Physicians and surgeons 🔑18(9)

In granting motion for nonsuit in malpractice action, in which question of what is proper practice is uniformly for experts and can be established only by their testimony, liberality is not extended.

2. Trial 🔑139(1)

Where it could not be said that as matter of law no other reasonable conclusion was legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that appellate court would be impelled to reverse it upon appeal, or trial court to set it aside, nonsuit was error.

3. Appeal and error 🔑994(2)
Physicians and surgeons 🔑18(9)

In malpractice action, question under consideration is primarily for jury, and neither trial court nor court of review may substitute opinion of a layman on matter that is special subject on which medical practitioners are specially informed.

4. Physicians and surgeons 🔑18(9)

In malpractice action, where expert opinion evidence was not absent on any material issue, plaintiff had not failed to make out a case, and nonsuiting of plaintiff was error.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Lillian Ross, as administratrix of the estate of John McDonald Ross, deceased, against Arthur Hieronymus and others. From a judgment of dismissal, plaintiff appeals.

Reversed.

Alfred Nelson, of Oakland, for appellant.

Dutton & Gilkey and David C. Dutton, all of Oakland, for respondent.

STURTEVANT, Justice.

As administratrix of the estate of her deceased husband, the plaintiff commenced an action to obtain damages for malpractice. The defendant Arthur Hieronymus is a physician and surgeon. In her complaint the plaintiff joined as defendants several nurses who served the decedent during his last illness. Only Dr. Hieronymus answered, and the action was tried before the trial court sitting with a jury. After all of the evidence had been received, the defendant made a motion that a nonsuit be entered. The motion was granted, and a judgment of dismissal was entered. The plaintiff made a motion for a new trial which was denied. From the judgment, the plaintiff has appealed.

Shortly prior to November 6, 1929, John McDonald Ross was ailing with a carbuncle on the back of his neck. On the date last mentioned he went to the office of Dr. Hieronymus for treatment. He returned for treatment on the 7th, 8th, and 9th of November. Whether he returned on November 10th was a disputed fact. He did not go to the defendant on the 11th, 12th, and 13th days of November, but he did go on the 14th for a consultation only. On the 15th, under the defendant's direction, he went to a hospital where he was under the defendant's care until November 23d, on which date he died from septicemia resulting from the carbuncle.

In the plaintiff's complaint she pleaded the malpractice of the defendant, setting forth the facts in detail. In his answer Dr. Hieronymus denied all allegations of malpractice, and at least attempted to plead the contributory negligence of the decedent and of this plaintiff.

On the trial of the case, the evidence was not conflicting regarding the fact that Mr. Ross was afflicted with a carbuncle, that the disease increased as from the beginning, and that later septicemia developed and from that attack he died on November 23d, 1929. In presenting her case, the plaintiff called as a witness Dr. Hieronymus and other persons and introduced evidence showing what treatment the defendant gave and directed. Later she called as her witnesses Dr. Herbert R. Smith and Dr. Frank T. Duncan, two physicians and surgeons practicing their professions in Oakland, the same place where the defendant maintains an office and practices his profession, and the place where Mr. Ross was treated by the defendant. From Dr. Smith and Dr. Duncan the plaintiff developed evidence that the treatment administered by the defendant was not such as would have been administered by one who possessed and exercised the degree of skill or learning ordinarily possessed and exercised under similar circumstances by the members of his profession in good standing in the neighborhood of Oakland. In other words, she followed the rule stated in Perkins v. Trueblood, 180 Cal. 437, 181 P. 642. In the introduction of his case, the defendant took the stand as a witness in his own behalf. He also called as his witnesses Dr. Vernon G. Alderson, Dr. Harry J. Smith, and Dr. Ergo Majors. From those witnesses counsel for the defendant introduced evidence which for the purposes of this opinion it may be stated controverted the evidence so introduced by the plaintiff.

The defendant introduced evidence to the effect that the plaintiff and her deceased husband were guilty of contributory negligence which proximately contributed to the development of septicemia and the death of the decedent. It will suffice to state that such evidence consisted of showing that the defendant, at an early date, advised the decedent to go to a hospital, to stop work, to rest, to give up a heavy diet, and proceed to live on a light diet; and, until November 15th, the decedent did not follow any of said directions. He also introduced evidence to the effect that on one or more occasions the plaintiff dressed the carbuncle and the manner in which she did so. In this connection he also introduced evidence as to the effect, in the judgment of medical experts, the acts of omission and commission on the part of the deceased and the plaintiff had in the development of the carbuncle.

In reply the plaintiff introduced evidence that the deceased was an able-bodied man working for wages, that he had a wife and seven children dependent on him for a living, and that the work which he did was not heavy physical work. She also introduced evidence of medical experts that none of the acts of omission or commission on the part of the decedent and the plaintiff contributed proximately to the cause of death of the decedent.

[1] The plaintiff earnestly contends that, on the issue of malpractice on the part of the defendant, and on the issue of contributory negligence, while it must be conceded that the evidence was conflicting, nevertheless the case was not a proper one for the trial judge to order that a nonsuit be entered. The defendant answers this contention by asserting a nonsuit may properly be ordered when all of the evidence has been taken only when the judge would be compelled to set a contrary verdict aside as unsupported by the evidence. Continuing, he claims that, to warrant a court in granting a nonsuit at the close of all of the testimony, it is not necessary that there would be an absence of conflict in the evidence, but to deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one. Estate of Baldwin, 162 Cal. 471, 473, 123 P. 267. The plaintiff concedes the rule to be as stated, and quotes in reply: "But it is equally well established by the foregoing authorities, and many others that could be cited, that a directed verdict in favor of a defendant is unauthorized where there is substantial evidence, as we find exists in the case at bar, tending to prove in favor of plaintiff all of the controverted facts necessary to establish his case." Valdick v. LeClair, 106 Cal. App. 489, 499, 289 P. 673, 678. We think the reply is entirely sufficient. In other words, we think that there was substantial evidence tending to prove in favor of plaintiff all of the controverted facts necessary to establish her case. Bearing in mind that the plaintiff's cause of action sounds in malpractice, and bearing in mind also that in the presentation of such an action the question "as to what is or is not the proper practice is uniformly a question for experts, and can be established only by their testimony" (Patterson v. Marcus, 203 Cal. 550, 265 P. 222, 223), liberality in granting a motion for a nonsuit is not extended. In McGraw v. Kerr, 23 Colo. App. 163, 128 P. 870, the court was considering an alleged case of malpractice in which the setting of a broken arm was involved. At page 874 of 128 P., the court said:

"2. Appellant requested an instruction to the effect that in considering whether the defendant, in his diagnosis, care, and treatment of plaintiff's injured arm, exercised ordinary care and skill, the jury could not set up a standard of its own, but must be guided in that regard solely by the testimony of physicians; and that, if they were unable to determine from the testimony of physicians what constituted ordinary care and skill under the circumstances of this case, then there was a failure of proof upon the only standard for their guidance, and the evidence would be insufficient to warrant any verdict for the plaintiff.

"The authorities are practically uniform in holding, and counsel for plaintiff admits, that as to what is or is not proper practice in examination and treatment, or the usual practice and treatment, is a question for experts, and can be established only by their testimony. But counsel for appellee attempts to draw a distinction between the character of testimony necessary to establish a standard of proper treatment, and a standard of what constitutes ordinary care and skill. We perceive no difference. The instruction goes no farther than to direct the jury in what is admitted by plaintiff's counsel to be the law. In either case the standard must be established by the testimony of experts. In Jackson v. Burnham, supra (20 Colo. 532, 39 P. 577), the court, by Mr. Justice Goddard, said that, in order to determine whether the defendant (a surgeon) exercised ordinary care and skill in examining the case, as well as in applying remedies thereafter, resort must be had to the opinion of experts, based upon the ultimate facts as the jury may find them established by the weight of the evidence. The only rule asked for in the language of the instruction now under consideration is that, upon the question of standard, by which the jury must be guided in arriving at a conclusion as to what constituted care and skill, the testimony of experts (in this case, the physicians) alone must be considered. The standard, and the testimony by which it can be ascertained are the only matters involved. Upon that question we think there is no contrariety of opinion. If no standard was established by the testimony of physicians, then the jury had no standard. This does not militate against the right of the jury to decide between conflicting testimony of different physicians or experts on the question of a standard; it only goes to the extent that, if in doubt upon any matter necessary to enable the jury to say that a standard has been fixed for its guidance by the testimony of such qualified witnesses, then it cannot from other and incompetent evidence, or without evidence, raise a standard.

"We think that refusal to give this instruction, and the giving of the instruction as modified by which the jury was permitted to find such standard from all of the testimony, both competent and incompetent as to that question, constituted error."

In Krueger v. Chase, 172 Wis. 163, 177 N. W. 510, the plaintiff based her charge of malpractice on the fact that the practitioner, while in the act of extracting a tooth, allowed the filling and a part of the tooth to drop into the plaintiff's throat and pass into her lung. The trial court followed its own judgment and opinions and brushed aside the opinions of the experts. At page 512 of 177 N. W., the court said:

[2-4] "The trial court was of the opinion that whether Dr. Hickey was negligent in permitting the escape of the particles of tooth and filling into the plaintiff's throat was not to be determined in accordance with the practice as established by the testimony of witnesses in the vicinity in which Dr. Hickey practiced, but was a matter which might be determined from common knowledge. He regarded the escape of the foreign matter into the plaintiff's throat as a physical fact, about which any ordinarily intelligent individual can form as correct a judgment as could the experts. In this we think the trial court was in error." Compare Nelson v. Painless Parker, 104 Cal. App. 770, 286 P. 1078.

In this state we find no authority directly in point. Winthrop v. Industrial Acc. Comm., 220 Cal. 114, 29 P.(2d) 850, and Nielsen v. Industrial Acc. Comm., 220 Cal. 118, 29 P.(2d) 852, come the nearest to being in point, but they are not. However, we consider both decisions as supporting all we have said. In Umsted v. Scofield Eng. Const. Co., 203 Cal. 224, on page 228, 263 P. 799, 800, Mr. Justice Seawell, speaking for the court, said: "Unless it can be said that, as a matter of law, no other reasonable conclusion was legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that an appellate court would be impelled to reverse it upon appeal, or a trial court to set it aside, it must be held that the court erred in taking the case from the jury and itself rendering the decision." In the instant case there does not appear to be anything to take it out of that rule. True it is that much of the evidence was given by experts. To the layman some reasons given and some opinions expressed might not have been convincing—they might have been quite to the contrary. However, these matters were for the jury. Sheldon v. Wright, 80 Vt. 298, 67 A. 807, was a malpractice case which was decided by the Supreme Court of Vermont. In that state the rule also obtains that what is or is not proper medical treatment is uniformly a question for experts, and can be established only by their testimony. As to how such evidence should be treated by the jury was the subject-matter of an instruction. Among other things, it contained a sentence, "But you are not bound to accept the statements or conclusions of expert witnesses." Commencing on page 814 of 67 A., the court said: "But this sentence in its connection was in no way misleading. The conclusions of the experts were conflicting. If some were right, others were necessarily wrong. The jury were left to determine the matter upon the whole evidence, and this course was entirely right, as, in any view, the strictly expert evidence was without value, except as it was based upon facts which the jury might find from other evidence. The ordinary witness testifies as to facts about which the jurymen have or should have no knowledge of their own; but, nevertheless, they must apply their own good judgment to the testimony of such witnesses in determining what facts are proved. The expert in a case like this testifies to facts of a different class, or to the interpretation of facts, matters, for the most part, about which the jury are not expected to have knowledge of their own, but nevertheless they must apply their sound judgment to the comparison, sifting and weighing of such testimony and to a consideration of the sources from which it comes. * * * The charge presents the sound and sober view that the jury are to hear and weigh the expert testimony, however conflicting it may be, with the same feeling of duty and responsibility as rests upon them in hearing and considering the other testimony, to the end that they may get from it all the aid it can give them in coming to a right decision of the very case in hand. It is believed to be the law that there cannot be a recovery for malpractice in the case of an operation like this under consideration without medical expert testimony tending to show lack of the requisite skill and care on the part of the defendant. But there may be such testimony, and yet the witness giving it may display such a lack of candor, such feeling, such advocacy, he may testify in such a way as to facts which are matters of common knowledge, or which are established by the testimony of nonexpert witnesses, that the jury feel that they cannot in good conscience accept his strictly expert testimony." In other words, the question under consideration is primarily for the jury and which that body must determine. It is not for the courts, either the trial court or a court of review, to substitute the opinion of a layman on a matter that is a special subject on which medical practitioners are specially informed. Krueger v. Chase, 172 Wis. 163, 177 N. W. 510. But, if in a given case such expert opinion evidence on a material issue is absent, then the plaintiff has failed to make out a case, Callahan v. Hahnemann Hospital et al. (Cal. Sup.) 35 P.(2d) 536, and in such a case a directed verdict is proper, Linn v. Piersol, 37 Cal. App. 171, 173 P. 763. In the instant case, our attention is not called to any gap in the evidence tendered by the plaintiff, and we have noticed none. While it might have been burdensome for the jury to weigh and estimate the value of the respective opinions expressed by the experts, nevertheless the duty rested on the jury and not on the court to do so. It follows that the trial court erred in directing the verdict.

The judgment appealed from is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

2 Cal.App.2d 234

In re BOYLE'S ESTATE.

GHEEN v. BOYLE et al.

Civ. 9612.

District Court of Appeal, First District, Division 2, California.
Nov. 15, 1934.

Wills 🔑566

Under paragraph of will disposing of all "money" after payment of bills, corporate stock *held* not included, but was required to be disposed of under paragraph of will devising all personal property not otherwise disposed of.

> "Money," in absence of anything in will calling for different construction in any other than popular and legal meaning, is confined to gold and silver and other circulating medium of the country, whether in testator's personal possession or deposited in bank (Probate Code, § 103).
>
> [Ed. Note.—For other definitions of "Money," see Words & Phrases.]

◆

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding in the matter of the estate of Isabelle G. Boyle, also called Isabella G. Boyle, deceased. From a decree of final distribution, Ellen Gheen, as administratrix with the will annexed of the estate of Isabelle G. Boyle, deceased, appeals, opposed by Mary Boyle and others.

Reversed, with directions.

Joseph Farry, of San Francisco, for appellant.

Eugene H. O'Donnell, of San Francisco, for respondents.

SPENCE, Justice.

This is an appeal by Ellen Gheen, the administratrix with the will annexed of the estate of Isabelle G. Boyle, deceased, and one of the legatees under the will of said deceased, from certain portions of the decree of final distribution.

Isabelle G. Boyle died testate on December 13, 1932, leaving a holographic will dated May 9, 1928, the main provisions of which will were as follows:

"I give to my sister-in-law Rachel Boyle my diamond pin and my watch in remembrance of her kindness to my Mother while she lived and to me after her death.

"I give to Sacred Heart Church $200.00 for Masses for the deceased members of my family.

"*All other money* I may die possessed of after all my bills are paid, I wish divided in six (6) equal parts—1 part for Rachel Boyle—1 part Mary Boyle—(my sisters in law—1 part for the children of my deceased Brother Edward Boyle—1 part for Annie Wilkinson—1 part for my sister Ellen Gheen 1 part for my God-child Eleanor Wilkinson.

"I give to my sister Ellen F. Gheen the deeds of the grave in Holy Cross cemetary with the use of the grave not yet opened (all others having been disposed of—*also all my personal property not all ready disposed of.*

"I give to my friend Mrs. E. Burke of 308 Waller St. (for her kindness to me) $400.00." (Italics ours.)

Upon the hearing of the final account the trial court found that the following constituted the estate subject to distribution: Money in bank, $1,127.72; diamond pin, appraised at $50; watch, appraised at "no value"; and corporate stocks, appraised at $6,122. In the decree of final distribution the trial court concluded "that the words 'all other money I may die possessed of after all my bills are paid,' include and were intended by said testatrix to include not only the moneys in bank, but also the corporation stock left by her at the time of her death." The trial court accordingly distributed the stock under the third paragraph of the will relating to "all other money" and not under the fourth paragraph of the will relating to "all my personal property not all ready disposed of." This appeal is taken from those portions of the decree which so distribute the said stock.

Appellant contends that the trial court erred "in deciding that the third bequest in the will of all other money of which the testatrix died possessed included the shares of corporation stock." In our opinion this contention must be sustained. The entire question revolves around the meaning of the word "money" as employed in paragraph three of the will. Section 106 of the Probate Code provides: "The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained." There is no doubt that the word "money" when taken in its ordinary and grammatical sense does not include corporate stocks. Thompson on Wills, § 215, says: "In its usual and ordinary acceptance it means, gold, silver, or paper money used as a circulating medium of exchange, and does not embrace notes, bonds, evidence of debt, or other personal or real estate, and this popular and well understood meaning should be given to the word when used in a will, unless from a consideration of the entire instrument it was intended by the testator to have a broader meaning and to include notes, bonds and other securities." Also in 18 Ruling Case Law, at page 1270, we find the following: "Where there is nothing in a will calling for a construction of the word 'money' in any other than its popular and legal meaning it will be confined to gold and silver and other circulating medium of the country, whether in the personal possession of the testator or deposited in the bank." See, also, 14 C. J. p. 388, § 511; Redfield, Law of Wills, p. 413.

Turning to the will before us, we find nothing contained therein to justify the conclusion that the word "money" was used in the third paragraph thereof in any sense other than its ordinary and accepted meaning. Although the will was drafted by the testatrix herself, it is singularly clear and unambiguous. It contains bequests of certain specific sums and certain specific personal effects. Paragraph 3 disposes of "all other money," and paragraph 4 disposes of "all my personal property not all ready disposed of." The only real property was a cemetery lot and, while this was also disposed of by paragraph four of the will, it was not listed in the inventory, the final account, or the decree of final distribution. It is mentioned here only to show that the will as drawn by testatrix made complete disposition of her entire estate and therefore no intestacy will result as to any portion of said estate. We therefore conclude that as the will disposed of the entire estate of the testatrix in clear and unambiguous terms and as it contained nothing to show an intention to use the word "money" in any broad and extended sense, said word must be confined to its ordinary meaning and scope which does not include corporate stocks. It follows that the corporate stocks should not have been distributed under paragraph three of the will but should have been distributed to appellant under paragraph four of the will.

We are fully aware that the word "money" has been given a broader significance under certain circumstances. Respondents cite and rely upon Estate of Carrillo, 187 Cal. 597, 203 P. 104; Estate of Miller, 48 Cal. 165, 17 Am. Rep. 422, and other similar cases. An examination of these authorities shows that in each case the intention to use the word "money" in an extended sense appeared upon the face of the will and in most of the authorities cited it was absolutely necessary to adopt the extended meaning in order to avoid intestacy. There is not a single one of the authorities cited which sustains respondents' contentions under the circumstances before us and the rule as stated and applied here is fully supported by the statement found in the opinion in the Estate of Miller, supra, at the bottom of page 169 of 48 Cal., 17 Am. Rep. 422. We may further point out that the result of adopting respondents' construction of the will would be to ignore and to deny any effect to the residuary clause in favor of appellant contained in paragraph four of the will. This would violate one of the cardinal rules of construction as embodied in section 103 of the Probate Code which provides: "All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole."

The portions of the decree of final distribution from which this appeal was taken are reversed, with directions to the court below to enter a decree consistent with the views expressed herein.

We concur: **NOURSE, P. J.**; **STURTEVANT, J.**

2 Cal.App.2d 386

MT. TAMALPAIS & M. W. RY. v. JOHNSON, State Treasurer.

Civ. 9619.

District Court of Appeal, First District,
Division 2, California.
Nov. 23, 1934.

Taxation ⚷148

Sight-seeing railroad authorized to suspend service each year from November 1 to March 1 was subject to tax based on gross income for 1929, levied upon railroad as operating railroad for taxable year 1930–31 on first Monday in March, 1930, notwithstanding that railroad, on February 28, 1930, was authorized to continue suspension until March 15 and never resumed operation, and notwithstanding Railroad Commission authorized complete abandonment of railroad on August 7, 1930, since railroad's status as operative or nonoperative was determinable as of first Monday in March, and operation was merely suspended on that date (Pol. Code, §§ 3665c, 3668c; Const. art. 13, § 14 (f)).

◆

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by the Mt. Tamalpais & Muir Woods Railway against Charles G. Johnson, State Treasurer of the State of California. Judgment for defendant, and plaintiff appeals.

Affirmed.

Thomas, Beedy, Presley & Paramore, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Plaintiff sued the state for taxes paid under protest for the taxable year 1930–31, and the defendant had judgment. For many years prior to 1930 the plaintiff had operated a sight-seeing railroad carrying tourists to Mt. Tamalpais and to Muir Woods. On December 6, 1917, the Railroad Commission authorized plaintiff to discontinue its operations each year during the months of November, December, January, and February because the winter rains made the tracks dangerous for passenger traffic. On February 28, 1930, an order was made continuing the suspension of service to March 15, 1930. On August 7, 1930, the Railroad Commission authorized the complete abandonment of the railroad. Thus, when a tax of $2,715.02 was levied on the first Monday in March, 1930, covering the gross income for the year 1929, the railroad was not in actual use, although the company still possessed all its properties such as rights of way and rolling stock, and it had not then been permanently abandoned. And, because the railway company and the taxing authorities then treated these properties as "operative," no local or ad valorem tax was levied upon them for that taxing period. The trial court held for the state on the grounds that the tax was valid on the first Monday in March because the railroad at that time was only temporarily abandoned and was in the same state as it had been for four months of every year since 1917.

Plaintiff contends that it ceased to be an operative railroad on October 31, 1929, and that there is no provision in the Constitution or Code for taxation of railroads deemed operative "in law" or otherwise than in actual operation. It argues that the fact that the directors were uncertain on March 3, 1930, whether or not operation was to be resumed is immaterial because the permanent nature of the suspension is shown by the fact that operation was not resumed. The actual character (temporary or permanent) of the railroad is declared to be the only basis for determining its taxable status, making the orders of the Railroad Commission of no consequence; and the final order of August 7, 1930, is relied on by plaintiff as proving the permanence of the abandonment.

The cause was tried before the court sitting without a jury and, in support of the judgment for the defendant, the learned trial judge prepared and filed a written opinion which fully covers all the issues tried and which we adopt as the opinion of the court. It reads as follows:

"The agreed statement shows that on December 6, 1917, the Railroad Commission authorized the discontinuance of operation of plaintiff's railroad each year during the months of November, December, January, and February until further order and that on February 28, 1930, an order was made continuing the suspension of service to March 15, 1930. On the first Monday in March of 1930, therefore, and at the time its report was filed with the board of equalization, the plaintiff was under a temporary suspension only. As I view the case, the situation as of the first Monday in March is not only controlling, but it is all that is material to a determination of this question. The tax was either valid or invalid as of that time, and if valid the plaintiff cannot prevail.

"Subdivision (f) of section 14 of article 13 of the Constitution provides that '* * * The taxes herein provided for shall become a lien on the first Monday in March of each year. * * * The gross receipts and gross premiums herein mentioned shall be computed for the year ending the thirty-first day of December prior to the levy of such taxes and the value of any property mentioned herein shall be fixed as of the first Monday in March. * * *'

"Section 3668c, Pol. Code, provides the same with respect to the lien attaching as of the first Monday in March, and furthermore it provides that 'Every tax herein provided for has the effect of a judgment against the company. * * *'

"Cooley on Taxation (4th Ed.) vol. 2, has this to say upon the subject of the time element: 'Sec. 546. *Time as of which liability determined.* The taxable status of persons and property relates to a certain day in each year. There must be some day of the year as of which the power to tax property at all, or the power to tax it to a certain person, is to be determined. * * *'

"At 27 Am. & Eng. Ency. of Law (2d Ed.), p. 662, it is said: 'The taxable status of persons and property generally relates to a day certain in each year. When the law thus provides, no taxes can be legally assessed and levied for a particular year unless the conditions requisite to liability exist on the day fixed; and no changes in ownership, fluctuations in value, nonresidence, removal or destruction of the property, or the like, occurring subsequent thereto, can be considered in making or reviewing an assessment. The very notion of an assessment involves the fixing of values as of a certain date, since there is no mode of making the valuation vary with the increased or diminished value during the current year, and if there were, such varying valuations would be destructive of established principles of uniformity.'

"In a lengthy footnote, cases in support of the text, just quoted are cited from many states, including California (San Gabriel, etc., v. Witmer Bros. Co., 96 Cal. 623, 29 P. 500, 31 P. 588, 18 L. R. A. 465, 470; San Francisco v. Pennie, 93 Cal. 465, 29 P. 66; San Francisco & N. P. R. Co. v. State Board of Equalization, 60 Cal. 12) and including Shotwell v. Moore, 129 U. S. 590, 9 S. Ct. 362, 32 L. Ed. 827, and Dodge v. Nevada National Bank (C. C. A.) 109 F. 726.

"See People ex rel. Murray v. St. Louis (1920) 291 Ill. 600, 126 N. E. 529.

"In the Dodge Case (C. C. A.) 109 F. 726, at page 731, it is said: 'The entire system of taxation in the state of California plainly contemplates the existence of property liable to be assessed for taxes, and that its assessment, at whatever date actually made, shall relate to some fixed period of time, and that the taxable status of the property is to be determined by its condition on that day. The constitution and codes clearly designate the time when the assessable character of property becomes fixed, to wit, "at 12 o'clock, meridian, on the first Monday in March", and the question here involved must be determined with reference to that date.'

"The plaintiff corporation determined after the first Monday in March, 1930, to permanently discontinue as an operating railroad. In the years elapsing between 1917 and 1929 during which interval it enjoyed, from the state, the privilege of suspending operations during the winter months when travel was light and tracks dangerous, no claim was made that it was nonoperative because of this suspension, or that it was eight-twelfths operative and four-twelfths nonoperative. In 1930, then, when this normal suspension of four months was stretched (by the order of February 28, 1930) to four months and a half, the plaintiff was no more a nonoperating railroad than it had been from November to February next preceding. The order of February 28, 1930, made a difference in degree only, not in the essential character of the road as an operating or a nonoperating utility. To put it another way: If from 1917 to 1929 it was an operating railroad despite the winter shutdowns each year, it remained an operating railroad during the first two weeks of March, 1930; that fortnight's extension not changing its character.

"Logically I can see no escape from the principle stated in the cases and texts cited above. As said in the Dodge Case: 'The taxable status of the property is to be determined by its condition on that day.' And the determination of the plaintiff corporation at a later time to discontinue operating cannot alter that status, as I see it, any more than the destruction, in August, of improvements which were upon real estate on the first Monday in March, can render illegal taxes theretofore levied upon such improvements, by relation back. As said at the outset, the tax is either valid or invalid on the first Monday in March. In California this taxable status is not left in doubt, it is chrystallized, in effect, into a 'judgment' (section 3668c, Pol. Code).

"Plaintiff concedes, for the sake of the argument, the force of the Dodge Case, and that the taxable character of the property is to be determined as of the first Monday in March of 1930, and then discusses the two limitations, first, actually engaged in public service and, second, 'operative' character of the property. The cases cited on that branch of the discussion do not help in solving the question. Certainly if plaintiff was not an operative railroad on the day in question, it could not be taxed as such. I find myself back at the original question and am unable to escape the conclusion that, although shut down for the winter on the day in question in 1930 plaintiff had no more ceased to be an operating railroad on that day in 1930 than it had upon corresponding tax days in 1929 and so on back to 1917. In this connection it is frankly stated by plaintiff that 'Since the date of this suspension order in 1917 its lines had always been suspensively inoperative as of the first Monday in March of every year but it had always filed the report required by section 3665c of the Political Code and paid the tax upon the theory that, upon a resumption of operations, notwithstanding the suspension, its properties acquired, by relation back, an operative status as of the first Monday in March. On March 13th, 1930, the date of the report here involved, it stood with operations suspended, but in the same position as in previous years with respect to an anticipated resumption upon the expiration of the suspension period.' I am unable to agree with counsel in what is said with respect to the doctrine of relation. The Dodge Case, as I read it, does not warrant that position, and the texts cited do not. In tax matters it would seem that, however unfairly and harshly the law might operate in given instances, there must be a rigid and unyielding line drawn if there is to be anything like uniformity.

"The 'equities' in this case are all on the side of the plaintiff. Without turning a wheel in 1930 it stands now $2,715.02 out of pocket for taxes paid as an operating unit. Against that, the state (acting through the Railroad Commission) has relieved it of the performance of its duties as a utility and has permitted it to tear up its tracks and permanently suspend rather than continue serving the public at a loss. Neither consideration, however, may be legitimately taken into account in this case. The case presents a cold question of law, and, however strongly a court might be inclined to relieve from a difficult situation, the relief must be legal in its character. How, legally, any relief can be given in this case I cannot see.

"No case has been cited by either side presenting a comparable situation, and the problem must be dealt with upon the general principles discussed earlier in this memorandum. Feeling that, in contemplation of law, the plaintiff was an operative company on the first Monday in March of 1930, the tax was validly levied irrespective of the subsequent fate of the railroad. It follows that judgment should go for the state."

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

CALIFORNIA CANNING MACHINERY CO. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.*

Civ. 10012.

District Court of Appeal, Second District, Division 2, California.
Nov. 21, 1934.

Rehearing Denied Dec. 19, 1934.
Hearing Granted by Supreme Court
Jan. 17, 1935.

1. Pleading 🔑3

Actions must generally be considered and tried upon, and within terms of, written pleadings.

2. Trial 🔑14

Ordering cause off calendar on defendants' oral objection pending appeal of same issues in another case between same parties, after demurrer to plea in abatement stating such ground had been sustained and no amendment had been made, *held* error.

◆

Proceedings by the California Canning Machinery Company against the Superior Court of the State of California, in and for the County of Los Angeles, and another, for a writ of mandate to require the vacation of an order of the Superior Court removing an action from the trial calendar and requiring that the action be heard and determined. On demurrer to the petition.

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 44 P.2d 1046.

Demurrer overruled, and peremptory writ granted.

Charles L. Nichols, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, both of Los Angeles, for respondents.

STEPHENS, Presiding Justice.

A writ of mandamus is prayed to require the vacation of an order of the Superior Court removing an action from the trial calendar and requiring that the action be tried and determined.

Petitioner herein and plaintiff in the referred to action, a corporation, according to the allegations of the complaint had heretofore entered into a written agreement with one of the defendants in the action. By its action the corporation seeks to have the meaning of the agreement declared and that if the alleged contract does not mean what plaintiff alleges it to mean that the agreement be reformed.

The defendants in their answer set up the plea of abatement and allege that an action in a different department of the same court had theretofore been brought, prosecuted to judgment, and that appeal was then pending upon the same issues between the same parties. This with two differences, however. The principals, or parties to the action, were reversed as to their status of plaintiffs and defendants and the plaintiff in the first suit brought was a corporation whereas this corporation and an individual were defendants in the last suit brought.

A demurrer to the abatement plea was sustained and defendant did not amend within the time allowed or offer to amend at all, but at the time the cause was called for trial oral objection to proceeding was made by defendants on the ground that the issues between the parties had been adjudicated and that the case should be put off the calendar until appeal in the first case should have been decided. The court ordered the cause off calendar.

[1, 2] From the showing made to us there was no pleading whatever before the trial court showing that the two cases were based upon the same issues or that the cause was between the same parties and neither would seem to be the exact fact though we do not so decide. While the pleadings of actions under our Code are simple and nontechnical, still actions must generally be considered and tried upon and within the terms of written pleadings. The case was before the court for trial and there was no legal reason before the court for its being refused trial. The order was not a simple continuance until an imminent decision should be handed down which would guide the court, but was a complete elimination of the case from the trial calendar.

The cause is submitted to us for disposition upon the petition and a demurrer thereto.

The demurrer is overruled, and the peremptory writ is granted.

We concur: CRAIL, J.; SCOTT, Justice pro tem.

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2 Cal.App.2d 188

PEOPLE v. VOSS.

Cr. 1818.

District Court of Appeal, First District,
Division 2, California.

Nov. 13, 1934.

1. Criminal law 🔑1202(1)

Accused, who had been convicted in federal court of conspiracy to commit federal offense under statute relating to rescuing of prisoner or concealing person from arrest, could not escape conviction of carrying concealed weapon after having been convicted of a felony on ground that federal offense was not of a felony (St. 1931, p. 2316, § 2; U. S. Cr. Code, §§ 37, 141, 335 [18 USCA §§ 88, 246, 541]).

2. Criminal law 🔑1202(3)

In prosecution for carrying concealed weapon against accused who had been convicted of a felony, generally, judgment roll must be produced, but judgment only will be received if it contains sufficient recitals (St. 1931, p. 2316, § 2).

3. Criminal law 🔑1202(3)

In prosecution for carrying concealed weapon against accused who had been convicted of federal felony, reading of judgment roll by district attorney *held* not error, since prosecution was bound to prove judgment it alleged, and was not bound at its peril to determine whether judgment as framed was sufficient (St. 1931, p. 2316, § 2).

4. Weapons 🔑4

Under information charging accused with feloniously possessing and carrying firearm concealed upon his person, evidence *held* not insufficient because it disclosed that firearm was in accused's house in a closet, since statute prohibits accused to have firearms in his possession or under his custody (St. 1931, p. 2316, § 2).

5. Criminal law ⚷1202(7)

In prosecution for carrying concealed weapon against accused who had been convicted of federal felony, error in permitting cross-examination of accused as to whether he had not gone by name other than one given on stand, and whether name of woman who was with accused when arrested was other than one testified to by accused, *held* not prejudicial, where necessary facts that accused had been convicted of a felony, and that on certain date he had in his possession pistol capable of being concealed upon his person, were clearly proved (St. 1931, p. 2316, § 2).

◆

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Clifford Voss was convicted of carrying a concealed weapon, and he appeals.

Affirmed.

Victor Wells, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

STURTEVANT, Justice.

The defendant was convicted of a felony. He made a motion for a new trial, the motion was denied, and he has appealed from the judgment and from the order denying him a new trial.

The charging part of the information was as follows: "The said Clifford Voss, having been heretofore, to-wit: on or about the 5th day of May, 1926, convicted in the United States District Court for the Northern District of California, of the crime of felony, towit: Violation of section 37 of the Criminal Code of the United States (conspiracy to violate section 141 of the Criminal Code of the United States), that the said judgment upon said conviction was pronounced, rendered, given and made on the said 5th day of May 1926, and bears last mentioned date, and has never been reversed, annulled, or set aside; that thereafter, towit: on or about the 22d day of March 1934, in the said City and County of San Francisco, State of California, the said Clifford Voss, did then and there wilfully, unlawfully and feloniously possess and carry concealed upon his person, a certain firearm, towit: a pistol, less than twelve inches in length, and then and there capable of being concealed upon the person; * * *"

The charge was based on section 2 of chapter 1098 of the Statutes of 1931 (page 2316). From that section we quote as follows: "On and after the date upon which this act takes effect, no person not a citizen of the United States of America and no person who has been convicted of a felony under the laws of the United States, of the State of California, or any other state or any other government or county, or who is addicted to the use of any narcotic drug or drugs shall own or have in his possession or under his custody or control any pistol, revolver or other firearm capable of being concealed upon the person. The terms 'pistol,' 'revolver,' and 'firearms capable of being concealed upon the person' as used in this act shall be construed to apply to and include all firearms having a barrel less than twelve inches in length."

[1] The first point made by the defendant is that the prior conviction was of a misdemeanor and not of a felony. As the federal statutes stood before the amendments of 1909 that contention should be sustained. Berkowitz v. United States (C. C. A.) 93 F. 452. However, in 1909 the federal statutes were amended to take effect in 1910, and since the amendments took effect the prior offense alleged in the information before us was a felony. Section 335 of the U. S. Criminal Code (18 USCA § 541); Waldeck v. United States (C. C. A.) 2 F.(2d) 243.

[2, 3] In his next point the defendant complains because the district attorney in presenting his case attempted to read the judgment roll in the action in which the prior conviction was had. In this connection the defendant claims that the judgment only should have been read. We think no error is shown by the record. The prosecution was bound to prove the judgment which it had alleged. There were two possible methods. The general rule is that the judgment roll be produced. 15 Cal. Jur. 288. When it contains sufficient recitals the judgment only of a court of general jurisdiction will be received. Hibernia Savings & Loan Soc. v. Boyd, 155 Cal. 193, 100 P. 239. To make its proof the prosecution called Mr. Colbreath, a deputy clerk of the court in which the conviction was had. He produced the original papers. Having done so, the prosecution was not bound at its peril to determine whether the judgment as framed came within the doctrine stated in Hibernia Savings & Loan Soc. v. Boyd, supra, but it was entitled to proceed under the general rule. The defendant did not offer to stipulate to any set of facts,

but stood on his rights and remained silent until about half of the record had been read. He then objected. His objection was properly overruled. Later he made a motion to strike out all except the judgment itself. The motion was granted. The ruling was more favorable to the defendant than the record justified.

[4] The defendant contends that the evidence adduced upon the trial of said cause was insufficient to justify the verdict of the jury. He bases this statement upon the fact that the information alleged "* * * did then and there wilfully, unlawfully, and feloniously possess and carry concealed upon his person, a certain firearm * * *." He then points to the evidence that the firearm was in the closet in the defendant's house, but there was no evidence that he carried it concealed. Turning back to the statute which we have quoted, it will be noticed that the statute is in the disjunctive and that it prohibits certain classes to "* * * have in his possession or under his custody or control any pistol," etc. There was evidence that the defendant had the pistol in his possession, in his custody, and under his control. Having it concealed upon his person was not a call of the statute.

[5] The third point made by the defendant we will take up last. He complains of misconduct on the part of the district attorney. The first assignment refers to the act of the district attorney in reading the judgment roll. As to that act we find no error and have discussed it above. He then refers to what occurred on his cross-examination. The proceedings were as follows:

"Cross-examination. Mr. Skillen: What is your name? A. Clifford Voss.

"Q. Did you ever go by the name of William Barlow?

"Mr. Wells: That will be objected to, your Honor, it makes no difference how many names he went by; this charge is possession.

"The Court: The objection is overruled."

At the time of the arrest the defendant and a woman were riding in an automobile. The woman gave the name of Gladys Gibson. The defendant gave his name as Jack Wilson. Further on in the cross-examination of the defendant the following proceedings were had:

"Q. What is the lady's name? A. Gladys Gibson.

"Q. Her name, as a matter of fact, was Berta, wasn't it?

"Mr. Wells: Well, of course, that will be objected to as calling for the conclusion of the witness.

"The Court: The objection is overruled."

As the defendant contends, we think both rulings were erroneous. However, we are equally clear that neither ruling under the facts of the instant case could have been prejudicial to the defendant. The prosecution was called upon to prove two major facts: (1) That on the 5th day of May, 1926, the defendant was convicted of a felony; and (2) that on the 22d day of March, 1934, he had in his possession a pistol less than twelve inches in length capable of being concealed upon the person. Both facts were clearly proved beyond debate. It is difficult to see how the jury could have brought in any other or different verdict. It is manifest that the errors just recited added nothing whatever to the case of the prosecution. The defendant cites and relies on People v. Fleming, 166 Cal. 357, 136 P. 291, Ann. Cas. 1915B, 881. It is not helpful. In that case the charge was murder. In deciding the cause the court took thirteen pages in delineating the case as made by the prosecution. Then on page 370 of 166 Cal., 136 P. 291, 297, the court said: "We have not set forth the foregoing in regard to the evidence for the purpose of establishing that it is not technically sufficient to support a verdict of guilty, for under our well-established rule such a conclusion cannot be reached by an appellate court. * * * It is the 'opinion' of the court based upon a full consideration of the particular record that is to control upon the question whether the error complained of has resulted in a miscarriage of justice." In that particular case it was the theory of the prosecution that Fleming slugged the deceased in such a manner that he died from the effects thereof. When the defendant was on the stand as a witness in his own behalf, on cross-examination he was asked and compelled to answer whether at one time he was called Bob Emmett and during that time he was a prize-fighter. Without going further, we think it is clear that the case is not applicable in favor of this defendant.

We find no prejudicial error in the record. The judgment and order are affirmed.

We concur: NOURSE, P. J.; SPENCE, J

2 Cal.App.2d 141

PEOPLE v. HILL.

Cr. 1352.

District Court of Appeal, Third District, California.

Nov. 9, 1934.

Rehearing Denied Nov. 24, 1934.

Hearing Denied by Supreme Court Dec. 6, 1934.

1. Time 🔑4

Indictment found October 20, 1933, charging embezzlement on October 21, 1930, *held* not barred by three-year limitation on theory that three years of 365 days had expired because of intervention of leap year (Pen. Code, § 800; Pol. Code, § 3257).

2. Time 🔑9(2)

Last day of limitation period must be included in calculating whether indictment was timely found (Pen. Code, § 800).

3. Indictment and Information 🔑104

Statute requiring that, whenever character or grade of offense, or its punishment, depends on value of property, such value shall be estimated exclusively in United States gold coin, refers to testimony, not pleadings (Pen. Code, § 678).

4. Indictment and Information 🔑159(2)

Allowing amendment to indictment for grand theft by embezzlement of $656, lawful money of United States, by adding "of the value of $656, lawful money of the United States" *held* not violative of statute prohibiting amendment of indictment so as to change offense charged (Pen. Code, §§ 487, 678, 1008; Const. art. 6, § 4½).

5. Criminal law 🔑1144(3)

Indictment will be presumed to have been presented to court by foreman of grand jury, in their presence, although such fact is not indorsed thereon, where record shows nothing to contrary.

6. Indictment and Information 🔑30, 47

Either district attorney or grand jury may charge accused with criminal offense, but charge brought by district attorney must show that district attorney makes it, and indictment found by grand jury must show that it was found solely by grand jury, and on its own investigation.

7. Indictment and Information 🔑30

Count of indictment, found by grand jury, alleging that "people" complain *held* void as indicating that accusation made therein was by some body other than grand jury.

8. Criminal law 🔑564(3)

Venue of crime may be established by circumstantial evidence.

9. Criminal law 🔑564(3)

In embezzlement prosecution, circumstantial evidence that accused converted money in county of trial *held* sufficient to establish venue.

10. Embezzlement 🔑44(1)

In embezzlement prosecution, evidence *held* sufficient to show corpus delicti, although state's evidence did not show that money in question was actually paid to accused, where accused testified that he had received money and used it in his own business.

11. Criminal law 🔑406(4)

Admissions of guilt made by accused in voluntarily testifying under oath in open court *held* competent, and not subject to limitations applicable to extrajudicial confessions or statements.

12. Embezzlement 🔑47

In embezzlement prosecution, intent with which accused attorney converted client's money to his own use was matter for jury, in light of surrounding circumstances (Pen. Code, §§ 21, 511, 512).

13. Criminal law 🔑563

Corpus delicti of offense may be proved by testimony of accused, when he voluntarily becomes witness.

14. Embezzlement 🔑10

Where prosecuting witness sent accused money to lend out accused's conversion of payments made on resulting loans constituted "embezzlement," as against contention that relation of debtor and creditor existed between accused and prosecuting witness (Pen. Code, § 503).

[Ed. Note.—For other definitions of "Embezzle; Embezzlement," see Words & Phrases.]

15. Criminal law 🔑565

Evidence that check, proceeds of which accused allegedly embezzled was delivered to accused, and indictment returned within three years *held* sufficient showing that conversion of proceeds took place within limitation period (Pen. Code, § 800).

16. Embezzlement 🔑11(1)

Demand for return of property or money intrusted to bailee or trustee, followed by refusal, is not element, but merely evidence, of "embezzlement" (Pen. Code, § 503).

17. Embezzlement 🔑44(2)

In determining intent with which accused converted proceeds of check executed in payment of note, jury could consider time which elapsed between receipt of check and disclosure of what had been done with proceeds, fact that no information was conveyed to payee until he questioned accused, and accused's failure to notify payee of payment of note and to secure its possession for delivery to makers (Pen. Code, §§ 21, 511).

18. Criminal law ⚷722½, 730(13)

In embezzlement prosecution, remark of counsel for people in handing chattel mortgage to counsel for accused, "Here it is, forgery and all," which court immediately admonished jury to disregard, *held* not to require reversal, where accused's counsel elicited testimony on cross-examination indicating forgery by accused.

19. Criminal law ⚷1173(2)

In embezzlement prosecution, failure to specifically advise jury that all jurors must concur in verdict as to each count *held* harmless, where jury was polled and each juror stated that each of verdicts of guilty was his verdict.

20. Criminal law ⚷772(2)

In embezzlement prosecution, failure to charge statutory definition of embezzlement *held* not reversible error, where court fully advised jury as to governing law (Pen. Code, § 503).

21. Embezzlement ⚷23

No arrangement made after embezzlement could mitigate offense or bar state's right of prosecution.

22. Criminal law ⚷784(4)

In embezzlement prosecution, instruction that accused's intent in appropriating funds was within jury's province and should be determined from all testimony, circumstantial and direct, and that testimony must be inconsistent with any reasonable theory of innocence and show accused's guilt beyond any reasonable doubt *held* proper.

23. Criminal law ⚷829(3)

In embezzlement prosecution, where instructions properly submitted four elements of embezzlement, elimination of such elements from accused's proposed instruction was not prejudicial.

24. Criminal law ⚷1186(4)

In embezzlement prosecution, testimony supporting charge *held* to preclude reversal on grounds of miscarriage of justice because of technical defects or omissions in instructions (Const. art. 6, § 4½).

25. Criminal law ⚷941(1)

Refusal of new trial of embezzlement charge for newly discovered evidence relating to trust deed which was cumulative of testimony presented to jury *held* proper.

26. Criminal law ⚷911

Granting or refusing of new trial rests largely in trial court's discretion.

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Forrest C. Hill was convicted of embezzlement, and he appeals.

Affirmed in part, and reversed in part.

Clifford A. Russell, P. H. Johnson, and Irving D. Gibson, all of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant was convicted of the offense of embezzlement, and from the order of the court denying his motion for new trial, and entering judgment of conviction, this appeal is taken. The indictment upon which the appellant was arraigned and tried is in the following words and figures, to wit. (Omitting title):

"The Grand Jury of the County of Sacramento hereby accuses Forrest C. Hill of the crime of grand theft committed as follows: That on or about the 21st day of October, A. D. 1930, at the County of Sacramento, in the State of California, Forrest C. Hill did then and there wilfully, unlawfully and feloniously take the property of F. D. Raymond, consisting of $656.00, lawful money of the United States, of the value of $656.00, lawful money of the United States; and as a second, separate and distinct count, the People of the State of California complain against the said Forrest C. Hill for the crime of grand theft committed as follows: That on or about the 21st day of October, 1930, in the County of Sacramento, State of California, the said Forrest C. Hill did then and there wilfully, unlawfully and feloniously take the property of Ione W. Raymond, consisting of $325.00 lawful money of the United States, of the value of $325.00 lawful money of the United States; and as a third, separate and distinct count the People of the State of California complain against the said Forrest C. Hill for the crime of grand theft committed as follows: That on or about the 12th day of June, 1931, in the County of Sacramento, State of California, the said Forrest C. Hill did then and there wilfully, unlawfully and feloniously take the property of F. D. Raymond consisting of $180.63, lawful money of the United States, and of the value of $480.63, lawful money of the United States, contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the People of the State of California.

"Neil R. McAllister
"District Attorney of Sacramento County, in the State of California.
"By ——————"

To this indictment the appellant demurred, pleading that the offenses attempted to be set forth in the various counts are barred by the statute of limitations; likewise, that none of the three counts state facts sufficient to charge the defendant with any offense.

Upon this appeal a number of points are urged for reversal, to wit: That it appears on its face that it is barred by the statute of limitations; that the indictment as a whole is void because it shows on its face that it was not presented by the foreman of the grand jury; that count No. 3 of the indictment is void and of no effect for the reason that it is not an accusation by the grand jury of the county of Sacramento; that the court erred in refusing certain instructions modifying certain instructions proffered by the defendant, and in giving certain instructions at the request of the prosecution, and of its own motion; that neither the corpus delicti nor the venue of the offense was proved; that the prosecution failed to prove that the defendant received any money.

[1, 2] Under the present method of pleading, embezzlement is charged as grand theft. The indictment in this case charges the offense to have been committed on or about the 21st day of October, 1930. The indictment was returned and filed on the 20th day of October, 1933. By the provisions of section 800, Penal Code, the indictment charging the offenses under consideration herein must be returned within three years following the alleged date of the offense.

The contention is made by the appellant that as a year is described in the Political Code, section 3257 thereof, as being a period of 365 days, and owing to the fact that leap year intervened, more than three years had expired, counting each year as 365 days between the date of the alleged offense and the date of the filing of the indictment. This, however, we must conclude to be an erroneous conclusion, as the language of the section specifies that the added day in leap year is simply, in law, only the day preceding. After defining the term "year" as 365 days, "half-year," and "quarter-year," the section reads:

"And the added day of a leap-year, and the day immediately preceding, if they occur in any such period, must be reckoned together as one day."

Thus, even though a leap year intervened between the alleged date of the offense and the date of the finding of the indictment, three periods of 365 days did not intervene between the date of the alleged offense and the filing of the indictment. The last day of the period was the day on which the indictment was returned, and must be included in calculating the time.

While a number of authorities have been cited, we do not need to refer to them, but will call attention simply to 62 C. J., page 1009.

[3, 4] Count 1 of the indictment as returned by the grand jury, reads as follows:

"The Grand Jury of the County of Sacramento hereby accuses Forrest C. Hill of the crime of grand theft, committed as follows: That on or about the 21st day of October, A. D., 1930, at the County of Sacramento, in the State of California, Forrest C. Hill did then and there wilfully, unlawfully and feloniously take the property of F. D. Raymond consisting of lawful money of the United States."

Thereafter, following the plea of not guilty by the appellant, the district attorney was allowed to amend this count in the indictment by adding the words "of the value of $656, lawful money of the United States."

It is contended by the appellant that the indictment as presented, in so far as this count is concerned, was insufficient in substance, and that the addition of the amendment by the district attorney, as permitted by the court, was not warranted by the provisions of section 1008 of the Penal Code, and that the section referred to contains the following: "An indictment cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination." This argument is based upon the theory that to merely allege "$656.00, lawful money of the United States," is not a statement of value, and in making this claim we are referred to the provisions of section 678 of the Penal Code which reads: "Whenever in this code the character or grade of an offense, or its punishment, is made to depend upon the value of property, such value shall be estimated exclusively in United States gold coin." This section, however, we conclude refers to the question of testimony, and not to a matter of pleading. Section 4½ of article 6 of the Constitution, as to errors in pleadings, is applicable, as the alleged error is not misleading or prejudicial.

Section 487 of the Penal Code, describing grand theft, so far as pertinent here, reads: "When the money, labor or real or personal property taken is of a value exceeding two hundred dollars," when it comes to proving the value as exceeding $200, then that value is to be measured or estimated in gold coin of the United States.

Even where the section is applied as to estimating value by the testimony, we find the following language in the case of People v. Keach, 28 Cal. App. 195, 151 P. 747, 748, which we think applicable here: "So here we think that the evidence above mentioned is sufficient to sustain the verdict, so far as this question of value is concerned. And it would surely be catching at a straw to reverse this case merely because no witness had estimated the value 'in gold coin of the United States of America.'"

In the case which we have just quoted, the testimony had to do with seventeen tons of hay of the value of $9 per ton. Gold coin was not mentioned in the testimony, nor does it appear from the case that gold coin was mentioned in the information. We think in this case it would be catching at a straw to say that $656, lawful money of the United States, is not of the value of $656, lawful money of the United States, whether the amendment made by the district attorney were or were not incorporated in the first count of the indictment. And it would likewise be catching at a straw to say that $656, lawful money of the United States, is not of the value of $200, as referred to in section 487 of the Penal Code. It is to be noted that the kind of money is not particularized in describing the crime of grand theft.

[5] So far as the presentment of the indictment in open court in the presence of the grand jury is concerned, there is nothing upon the face of the instrument to show the contrary. Therefore, the holding in the case of People v. Blackwell, 27 Cal. 66, is controlling. It is there said: "It will be presumed that an indictment was presented to the Court by the Foreman of the Grand Jury, and in their presence, although that fact is not indorsed on it, if the record of the Court shows nothing to the contrary."

None of the cases, so far as we have been able to examine them, hold that the indictment must specify value in gold coin. The case of People v. Ball, 14 Cal. 101, 73 Am. Dec. 631, specially relied upon by the appellant, does not support his contention. It was there held only, that an indictment describing money as "$3,000.00, lawful money of the United States," is insufficient. The particular denominations or species of coin must be set forth. This case was decided in 1859, and is based upon the old common-law forms of pleading as found in Wharton on Criminal Law, which is no longer controlling in this state.

[6, 7] Count 3 of the indictment stands out distinctly by itself. It reads: "And as a third, separate and distinct count, the People of the State of California complain against the said Forrest C. Hill for the crime of grand theft committed as follows:" (as hereinbefore described). This is not an accusation by the grand jury. It is simply a statement by the grand jury that the people of the state of California complain against Forrest C. Hill.

While we might infer or presume that the grand jury took testimony in relation to the offense set forth in count 3, it is explicitly denied by the words which we have just set forth.

Under the law relating to preferring charges against defendants in this state, the district attorney is permitted to charge a defendant with a criminal offense, but it must appear that the district attorney makes the charge. Likewise, a grand jury is authorized to accuse one with the commission of an offense, but it must appear upon the indictment that such accusation is by the grand jury, and not by some one else, or some other body of people. The indictment must show that it was found solely by the grand jury, and upon its own investigation.

We think it is clear that that portion of the indictment described as count 3, is absolutely void, and must be, and is so held.

Count 2 was dismissed, and therefore needs no consideration.

[8, 9] Does the record show that the venue was properly laid in Sacramento county? We think so. The testimony is to the effect that the defendant was a lawyer and real estate broker living and maintaining offices in the city of Sacramento; that for a number of years he had been handling and investing loans for the prosecuting witness, Mr. Raymond, and also for Mrs. Raymond, the wife of the prosecuting witness. Prior to her death, Mrs. Raymond would call up the office of the defendant in Sacramento and go over the loans. While we have found that count 3 in the indictment is void, the testimony as

to counts 1 and 3 is so intermingled that it must be considered as a whole.

Two loans are involved in this action, which we will call the "B and T" loans. These loans were made by the defendant from his office in Sacramento, from moneys deposited with him for that purpose by Mr. and Mrs. Raymond. On or about the times alleged in the indictment, these loans were repaid through an abstract and title insurance company's office, by means of checks which were delivered to the defendant, aggregating the sum of $981. These checks were deposited in the California National Bank, in the city of Sacramento. The testimony introduced on the part of the prosecution does not show that the money represented by these checks was actually paid to the defendant. This omission, however, was supplied by the testimony of the defendant himself, who stated that he had received the money and used it in his own business. The defendant's business office, as we have stated, was located in the city of Sacramento. After receiving the money in the manner which we have stated, he failed and neglected to pay the same over to Mr. Raymond, and likewise failed to advise Mr. Raymond of the receipt of the money until after he had used the same in his own business. It is not necessary that venue be established by direct evidence. It is sufficient if the circumstances shown in the record lead to such conclusion, and, as shown in this case, almost unerringly does lead to the conclusion that the money was converted by the defendant in the county of Sacramento.

In the case of People v. Peete, 54 Cal. App. 333, 202 P. 51, 64, the law in relation to the proof of venue is thus stated: "The venue, like any other fact in a criminal case, may be established by circumstantial evidence. And though no witness testified that Denton was murdered in Los Angeles county, the conviction being based entirely on circumstantial evidence, it is uncontradicted that the body was found in the city of Los Angeles, in the basement of the house that Denton had leased to defendant, many miles from the county line, covered with a mound of dirt, canvas and other articles, showing that the body had been placed there by some one. This evidence, unexplained, was sufficient to justify the jury in concluding that the homicide was committed in Los Angeles county. In Hawkins v. State, 60 Neb. 380, 83 N. W. 198, it was held that—'Evidence of the finding of the body of the person alleged to have been murdered, in an old well which had been subsequently filled, situate in Frontier county, is sufficient, in the absence of other proof, to warrant the jury in concluding that the homicide was committed in that county.' To the same effect is People v. Kamaunu, 110 Cal. 609, 42 P. 1090. See, also, Wharton on Homicide, pp. 901, 902." See, also, People v. Gordon, 133 Cal. 328, 65 P. 746, 85 Am. St. Rep. 174; People v. Murphy, 51 Cal. 376.

[10] The objection that the corpus delicti was not proven is likewise untenable. The answer to this objection is contained in part in what we have said in relation to the question of venue.

The check to which we have referred and which was delivered to the defendant reads as follows:

"Fidelity Title Insurance Co.
913–915 8th Street
No. 4619 Escrow
Bergh Sacramento, Cal. Oct. 21, 1930.
Pay to the order of F. C. Hill $981.00
Exactly Nine Hundred Eighty One
Dollars exactly Dollars
90–31 Fidelity Title Insurance Company

Seventh and J. Street
Branch Bank of
America of California,
Sacramento, Cal.

By Ross E. Pierce
Secretary
By A. M. Loveless
Asst. Secty."

Endorsements:

"Pay to the order of the
California National
Bank of Sacramento,
Calif., 90–33
Prior endorsements
guaranteed Hill Company
Clients Account (54)
F. C. Hill."

Pay only through
Clearing House
Oct. 23, 1930.
The California National
Bank of
Sacramento, Calif.

Perforations:

"90PD36
"10-23-30."

It is true that after introducing testimony showing the delivery of this check to the defendant, and the indorsements thereon that it went through the California National Bank in the city of Sacramento, no testimony was introduced by the prosecution to the effect that the moneys represented by the check had actually been paid over to the defendant. This omission, as we have stated, on the part of the testimony of the prosecution, was supplied by the testimony of the defendant himself. When called as a witness on his own behalf, he testified as follows (in relation to the questions we are considering):

"Q. What was the discussion, Mr. Hill, at that time about the Bergh loan and the Tanking loan, if any? A. Well, he seemed to know the loans had been paid off, and he came in to me and asked me about that. I told him the loans had been paid off, and I said, 'Fred, I have been using the money in my business';

and I offered to give him a note or a contract covering the payment of it; and he didn't seem to be disturbed or distressed or angry, or any other emotion, and said,—'Well,' says, 'Let it go as a loan,' he said, 'and pay me interest on it'.

"Q. Now, did he ever make any other demand on you for the money? A. Well, yes.

"Q. Well, personally? A. In 1933, or summer of 1933.

"Q. And where was that? A. At my office.

"Q. And what did he say then? A. He asked me once about when I could repay the money I owed him. There was no particular amount of money; he just mentioned the money that I owed him, which he talked along those lines, and I told him, then, I didn't have any money, and offered again to give him a note or contract, and I said, 'If you are not satisfied with that, I will give you a mortgage on anything I have;' and I explained to him that times had been hard with me, and I had lost a large amount of money in real estate, and that the security I could give him would not be a first loan, but I told him I would give him a mortgage on anything I had to satisfy him.

"Q. What did he say to that, if anything? A. He didn't say anything, except that he didn't—yes, or no, or anything else. It was just allowed to drag along."

Mr. Raymond's version of what was said differs from that of the defendant, in that he denied that he had ever loaned any money to Hill, or consented that the taking of the money by Hill should be considered as a loan. Irrespective of this, however, we do not see how any agreement on the part of Raymond to let the matter stand as a loan would relate back and nullify either the criminal intent or fraudulent conversion of the money to his own uses and purposes previously made. The transaction certainly justified the jury in inferring the appropriation of the money fraudulently and without the consent or knowledge of Raymond. The testimony shows conclusively that the fact of the misappropriation of the money was concealed from Mr. Raymond and was not mentioned by the defendant to Mr. Raymond until after Raymond had in some manner acquired knowledge thereof and called upon the defendant in relation thereto.

[11] The testimony of the defendant, as we have set forth, having been voluntarily given by him under oath in open court, it is not subject to exclusion or any limitation in its probative effects, under the rule relating to extrajudicial confessions or statements. Therefore, it is not necessary to review the cases cited by the appellant to the effect that extrajudicial confessions or statements of a defendant cannot be relied upon to sustain any part of the charge against him.

The law as to the admission and effect of confessions or statements made in open court by a defendant is, we think, correctly stated in 8 California Jurisprudence, page 108, to wit: "Voluntary admissions of guilt made by a defendant while testifying upon the trial of another charged with the same offense, or while testifying upon a preliminary examination of the charge against him, are competent evidence. Such statements are deemed voluntary," etc. See, also, People v. Fowler, 178 Cal. 657, 174 P. 892.

[12] While the defendant in this case did not admit that he was guilty of embezzlement, he did state facts showing that he had, without the knowledge or consent of Raymond, converted the money in question to his own uses and purposes, and, as stated in 8 California Jurisprudence, page 34, the intent with which the money belonging to Raymond was converted by the defendant to his own uses and purposes is a matter for the jury, and are proved by the circumstances surrounding and connected with the transaction, just as specified in section 21 of the Penal Code: "The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused."

Nor do the provisions of section 511 of the Penal Code come to the assistance of the defendant. That section reads: "Upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable. But this provision does not excuse the unlawful retention of the property of another to offset or pay demands held against him." Nor does the fact that the defendant intended subsequently to restore the property so converted to his own use assist the defendant in any particular.

Section 512 of the Penal Code precludes such a defense. That the money was unlawfully retained by the defendant will be referred to later on.

That the corpus delicti of an offense may be shown just as other facts are established, we may refer to the recent case of People v. Hudson (Cal. App.) 34 P.(2d) 741, 742. In that case extrajudicial confessions and admissions were introduced in evidence, and the language of the court must be considered with that in view. The court there said: "It is well settled, as appellant contends, that the corpus delicti must be proved by evidence outside of the declarations and admissions of the defendant; but it is equally well settled that, to authorize the reception and consideration by the jury of evidence of extrajudicial confessions or admissions of a defendant, the prosecution is not required to establish the corpus delicti by proof as clear and convincing as is required to establish the fact of guilt. Slight or prima facie proof is all that is necessary. People v. Bollinger, 196 Cal. 191, 237 P. 25; People v. Selby, 198 Cal. 426, 245 P. 426; People v. McWilliams, 117 Cal. App. 732, 4 P.(2d) 601; People v. Black, 111 Cal. App. 90, 295 P. 87; People v. Bonilla, 114 Cal. App. 219, 299 P. 784; People v. Wilcoxin, 69 Cal. App. 267, 231 P. 377; People v. Alba, 52 Cal. App. 603, 199 P. 894; People v. Vertrees, 169 Cal. 404, 146 P. 890. It may be proved by circumstances shown in evidence or by inferences drawn from facts shown. People v. Vicunia, 105 Cal. App. 145, 286 P. 1061; People v. Ford, 85 Cal. App. 258, 258 P. 1111. Direct or positive evidence is not essential (People v. Wilkins, 158 Cal. 530, 111 P. 612), nor is it necessary that such evidence in itself connect the defendant with the perpetration of the offense (People v. Jones, 123 Cal. 65, 55 P. 698). The decisions hold also that such proof may consist of the testimony of the defendant himself when he voluntarily becomes a witness in the case and testifies to facts which tend to prove the corpus delicti. People v. Kelly, 70 Cal. App. 519, 234 P. 110."

[13] The concluding paragraph of the quotation is controlling here, where it reads: "The decisions hold that such proof may consist of the testimony of the defendant himself when he voluntarily becomes a witness in the case and testifies to facts which tend to prove the corpus delicti."

In this particular we may call attention to the statement of the defendant to other witnesses relative to the misappropriation of the money belonging to Raymond, covering all the elements necessary to establish the offense of embezzlement under the charge of grand theft.

[14] Admitting that the defendant appropriated the money to his own uses and purposes, appellant argues the existence of the relation of creditor and debtor between himself and the prosecuting witness Raymond. This contention, however, is not tenable in light of the facts disclosed in the record.

The record shows that the money involved in the "B and T" loans was sent to the defendant by Raymond for the purposes of being loaned. The record likewise shows that on numerous previous occasions money had been sent by the Raymonds to the defendant for the purposes of loaning. It is not disputed that the money was sent by the Raymonds to the defendant for the purposes of loaning. Such facts constituted and created a trust relationship between the defendant and Raymond. The fact that the defendant was under obligations to account to Raymond for the money so received to be loaned by him, and would be legally liable to Raymond for all moneys collected by him on account of loans so made, does not establish the relationship known in law as debtor and creditor, or militate in any way against the trust relationship with reference to the money in question. Nor would the fact that Raymond and the defendant had in some deal which is mentioned in the testimony as the "cemetery" deal, the circumstances of which are not disclosed, created the relationship of debtor and creditor between the two, convert the trust relationship between Raymond and the defendant as to the moneys sent by Raymond to the defendant for the specific purposes of being loaned by him to others than himself, and the fact that the defendant thereafter collected the money and appropriated it to his own uses and purposes, would not annul the relationship of trustor and cestui que trust and create that of debtor and creditor as to the moneys so converted.

[15] In view of the fact that the check set forth herein was delivered to the defendant, and the indictment returned within the three years required by the Codes, the objection of the appellant that the conversion of the money is not shown to have taken place within the statute of limitations requires no consideration, the facts set forth being a complete answer.

[16] The objection of the appellant that no sufficient demand was made by Raymond for the return of the money, we think is completely answered by the opinion in the case of People v. Crane, 34 Cal. App. 599, 168 P. 377, 381, where this court, speaking through Mr. Justice Hart, set forth the law as follows: "The contention that no embezzlement of the money could take place without a demand by the owner for its return having been previously made upon the defendant is untenable. A demand for the return of property or money intrusted to a bailee or trustee, followed

by a refusal to return the property or money, is not itself an element of the crime of embezzlement, but constitutes mere evidence of embezzlement. It is true that a demand, followed by a refusal, is sometimes indispensable evidence of embezzlement; but it is the fraudulent and felonious conversion of the money or other property that constitutes the offense, and that may often be proved without a demand. People v. Bidleman, 104 Cal. 608, 38 P. 502; People v. Royce, 106 Cal. 173, 37 P. 630, 39 P. 524; People v. Gordon, 133 Cal. 328, 65 P. 746, 85 Am. St. Rep. 174; People v. Ward, 134 Cal. 301, 304, 66 P. 372; People v. Goodrich, 142 Cal. 216, 220, 75 P. 796; People v. Fisher, 16 Cal. App. 271, 275, 116 P. 688; Wharton's Criminal Law, § 1030."

The facts in the above case are very similar to the facts contained in the record before us. Crane had been intrusted with the loaning and collection of money by one Matilda King. The money was loaned, collected by Crane in the form of a check or draft; the money was deposited by Crane to the credit of himself and his wife, and thereafter checked out and converted to his own uses and purposes. This was held to constitute a sufficient basis for sustaining the verdict of the jury finding the defendant guilty of embezzlement.

[17] As bearing upon the question of intent with which the money was converted by the defendant, and also, as controverting any claim that might be made under the provisions of section 511 of the Penal Code, the jury was entitled to take into consideration the time which elapsed, running into months, between the receipt of the check dated October 21, 1930, before any disclosure was made or information conveyed to Raymond or any other person, as to what had been done with the money, and also, the further fact that no information was conveyed to Raymond, until Raymond, having learned otherwise of the payment of the "B and T" loans, confronted the defendant with questions concerning the money.

Notwithstanding the fact that the check for $981 heretofore referred to as having been delivered to the defendant, covered payment of the Bergh note, the note by Bergh in favor of Raymond, for which the payment was made, was allowed to remain in the possession of Raymond for a great many months, and until it was turned over by Raymond to the witness Butts, as hereinafter mentioned. During this time no notification appears to have been made by Hill to Raymond of the payment of the Bergh note. It was not called for by Hill to be delivered to the makers thereof after its payment. The note in question was dated November 22, 1929, for the sum of $656 principal. The check in payment of this note was delivered to the defendant in compliance with his letter dated September 27, 1930, addressed to the "Fidelity Insurance Company, Sacramento, California," and read as follows: "Gentlemen: I hand you herewith the Bergh reconveyances, for which please collect $981.00 before delivering. I will get the papers later as they are held up by a client up in the country. Very truly, (Signed) Forrest C. Hill."

The papers referred to were not obtained by the defendant from his client, whom the record shows resided in Roseville, a distance of about seventeen miles from the city of Sacramento. The jury had a right to consider this failure on the part of the defendant to notify Raymond of the payment of the note and secure its possession for delivery to the makers thereof, who, according to the record, had made payment in full. The jury was certainly justified in drawing the inference that this failure to notify Raymond that the note had been paid was for the purpose of concealing the fact that the money had been converted by the defendant to his own uses and purposes.

Bearing upon the question of intent, and also as negativing the provisions of section 511 of the Penal Code as a defense to this action, the testimony of the witness Butts may be properly referred to. This witness testified that in October, 1933, Raymond came to his office bringing papers relating to business theretofore transacted for him by the defendant. Among the papers brought to the witness by Raymond was the Bergh note. After testifying that he had known the defendant for about three years, the following questions were propounded to the witness, and answered as herein set forth:

"Q. Mr. Butts, I show you People's exhibit No. 1, being a note made payable to F. D. Raymond, in the sum of $656.00, and ask you if you have seen that note before, and when? A. I have; on the 2nd day of October, 1933.

"Q. And what was the occasion of your seeing it at that time? A. Mr. Raymond gave it to me.

"Q. For what purpose? A. For the purpose of collection.

"Q. Now, did you, after that time, have any conversation with the defendant Forrest Hill, regarding the note? A. I did.

"Q. When was it? A. That same night, October 2, 1933.

"Q. Where? A. In my office—North Sacramento.

"Q. And who was present? A. Mr. Hill and myself.

"Q. And what was the conversation? A. I told Mr. Hill that Mr. Raymond had brought me a bunch of papers, and I would like to get some information from him, as he had handled Mr. Raymond's business previously. Mr. Hill said he would help me, and I showed him a bunch of notes.

"Q. Now, just referring to this one note, will you say just what the conversation was with regard to this note, the Bergh note? A. He told me that they were having hard luck, or something of that kind, or that he hadn't been able to collect on it. * * *

"Q. Now, did you afterwards have any further conversation with him regarding the same note? A. I did.

"Q. When was that? A. My recollection is it was Wednesday afternoon, October 4th.

* * *

"Q. Who was present? A. Mr. Skirving, Mr. Hill and myself.

"Q. Now, what was the conversation regarding the Bergh note at that time? A. Mr. Hill admitted that he had collected the money and kept it.

"Q. Did he say when? A. No, he didn't say when until I referred to some notes that I had gotten from the county recorder's office, and I asked him if it was not a fact that the note was paid off in October, 1930, and asked him if he got the money, and he said the records were correct, that he had received the money. * * *

"Q. Did you at any other time have a conversation with Mr. Hill regarding the Bergh note? A. I did.

"Q. When was that? A. Three or four days subsequent thereto; in Mr. Jim Meredith's office.

"Q. Who was present at that time? A. Mr. Meredith, Mr. Hill, Mr. Hill's son and myself.

"Q. And what was the conversation at that time? A. Mr. Hill admitted collecting the money, and keeping it, and Mr. Hill wanted to pay back, wanted to give me a deed of trust on his wife's apartment house and some property on Stockton Boulevard, and his home as security for the money. * * *

"Q. What were his exact words, Mr. Butts? A. He said, 'I collected the money and kept it.' I said, 'Then you stole it;' and he said, 'Yes.' "

The testimony of this witness was substantially the same regarding the money that had been received in payment of the Tanking note which we have called the "T" note involved in count No. 3, which we have held should be set aside, and therefore, the testimony in relation thereto, of this witness, it not further set forth.

The testimony of Mr. Meredith relative to the conversation had in Mr. Butts' presence is simply to the effect that he did not recall Hill stating that he had stolen the money. It does not negative anything with regard to the statement of Mr. Hill that he had received the money in question and kept it.

[18] As a ground for reversal, the appellant urges misconduct on behalf of counsel for the people. It appears from the record that a certain deed of trust had been executed to secure the repayment of one of the loans made by the defendant for Mr. Raymond, which deed of trust was never recorded; that the original deed of trust was never sent to Mr. Raymond, but a copy thereof was made out by the defendant, including the signatures of the makers of the note in the deed of trust securing repayment, and that subsequently a chattel mortgage was executed covering the loan mentioned in the deed of trust, with an additional sum, and the original deed of trust was never placed on record. Some question came up in the course of the questioning of the witness Butts with regard to the authenticity of the copy of the deed of trust and the chattel mortgage, and one of counsel for the people, in finding the chattel mortgage and handing it to counsel for the defendant, accompanied it with this remark: "Here it is, forgery and all." The court immediately upon the request of the defendant, admonished the jury to pay no attention to the remark of counsel.

In view of the testimony elicited by counsel for appellant on cross-examination of the witness Butts we fail to see just how a complaint can be well founded against the remark of one of counsel for the people. The following is cross-examination to which we refer, which does not seem to have been referred to or mentioned in the direct testimony of the witness Butts and is exclusively matters brought out on cross-examination, to wit:

"Q. Now, on October 4th was anybody else present besides Skirving, Hill and yourself? A. No, sir.

"Q. You had a discussion there, didn't you, with Mr. Hill? A. Yes.

"Q. And at that time you made a demand on Mr. Hill for $2074.00? A. Yes, sir, after Mr. Hill told me that he had forged Fred and Lizzie Davis' name to the deed of trust, and had got $175.00 from Raymond and had paid the interest on it for three years at one per cent a month until it was outlawed; and when he got through I said: 'Forrest you are in an awful shape; the best thing we can do is for you to let us add all these things up and you give me a check for it, and let's forget it;' and we added it up and it came to $2074.43, and Mr. Hill told me that he had forged their names to the deed of trust, got the $175.00 from Mr. Raymond, and had kept the money, and had faked the recording of Root & Berger's name on it, and he had told me the loan was good, after I had been to Skirving's office, and when I checked the record and asked him whether the record was correct, he told me he guessed the records were right, and that he forged the deed of trust."

No motion was interposed to strike out any portion of this answer of the witness Butts.

The witness further testified that he asked Hill to give him a check for the money, and Hill replied: "I can give you anything but money."

After calling out and allowing to remain in the record the testimony just quoted, it certainly does not lie in the mouth of the appellant to insist that the jury was prejudiced by the chance remark of one of counsel for the prosecution which the court immediately ordered stricken from the record, and also admonished the jury to pay no attention thereto.

What we have set forth likewise answers the contention that the defendant was prejudiced by the remarks of counsel for the prosecution during the argument of the cause to the jury.

[19] We will first consider the last contention of the appellant, that the court prejudicially erred in its instructions to the jury, in that it did not specifically advise the jury that all of the jurors must concur in finding a verdict as to each count.

Upon the return of the jury with its verdicts which had been submitted by the court to the jury, one form of verdict referring to count No. 1, and one form of verdict referring to count No. 3, the jurors, at the request of the appellant, were polled, and each juror, as his name was called, responded that each verdict was his verdict; that is, all twelve jurors answered that verdict covering count No. 1 was his verdict, and all jurors responded to the question concerning count No. 3 that such verdict was his verdict, so that the jurors properly found their verdict, irrespective of the alleged error on the part of the court.

[20] An examination of the instructions given to the jury does reveal the fact that the court did not give, in exact language, the provisions of section 503 of the Penal Code, which defines embezzlement as the fraudulent appropriation of property by a person to whom it has been intrusted. However, the court did not quite fully advise the jury as to the law governing the cause under consideration. The jury was advised in the exact language of the Code defining grand theft, that the defendant was presumed to be innocent until proven guilty.

The rule as to reasonable doubt, as set forth in the Codes, was given to the jury in the identical language of the Code, that the burden of proof always rested upon the people; that the defendant was to be tried only for the offense of which he was charged; that they should take into consideration all the evidence and fairly consider it all. The jury was likewise instructed that if they found that the money in question was appropriated openly and avowedly, and under a claim of title preferred in good faith, then the defendant should be acquitted. Also, that if they had any reasonable doubt as to the felonious intent of the defendant to convert the money to his own use, the defendant should be acquitted. Further, that in the crime of grand theft, and before the jury could find the defendant guilty, they must find from the evidence that he intended to convert to his own use the money, and to cheat and defraud the prosecuting witness out of the same; and that, if they believed from the evidence there was a lack of criminal intent, the defendant should be acquitted.

The court further instructed the jury, in instruction No. 21, as follows:

"You are instructed that to constitute grand theft under our statute, you must believe from the evidence that the accused must have intended to permanently deprive the prosecuting witness out of the money named in the indictment; but if you believe from the evidence that the money shown to have been retained by defendant was so retained by him under a belief honestly entertained by him that he had the right to retain it, first as a loan to him, and later, openly and avowedly that he had a tenable claim against the prosecuting witness for attorneys' fees and other money, then defendant would not be guilty of the charge laid in the indictment, even though defendant were later found to have in fact no right to retain the money, for in such cases the fraudulent intent necessary to constitute grand theft would be absent, and defendant should be acquitted."

And also, at the request of the defendant, gave the further instruction numbered 22:

"You are instructed, that if you shall find from the evidence that the confidential relation between the prosecuting witness and the defendant terminated in the month of December, 1932; that in said December, 1932, said prosecuting witness was fully advised that the money mentioned in the indictments had been fully paid him, and that the said prosecuting witness then consented to defendant's holding the money as a loan until a later date or time that was not definitely fixed for its return, and after the confidential relation between the prosecuting witness and defendant had ceased, and the money was so held by defendant, with the consent of the prosecuting witness; and if you shall further find that no demand by the prosecuting witness, nor by any one on his behalf, was made upon the defendant before the date of his arrest, you are instructed that the prosecution has failed to establish the essential element of the crime of embezzlement—the fraudulent intent of the defendant to appropriate the money to his own use, and your verdict must be not guilty."

[21] This instruction was more favorable to the defendant than he was entitled to. The misappropriation was alleged to have taken place in 1930, and, as said in State v. Aceto, 5 Boyce (Del.) 597, 96 A. 206, no subsequent arrangement could mitigate the offense or bar the state's right of prosecution. See, also, Waters v. State, 15 Ga. App. 342, 83 S. E. 200; State v. Frisch, 45 La. Ann. 1283, 14 So. 132; State v. Chapin, 74 Or. 346, 144 P. 1187.

The jury was further instructed, by instruction No. 9, that if they found from the evidence in the case that the defendant, at the time he took the money, was then and there acting in the capacity of an agent of Fred W. Raymond, and that he obtained and held said money in his trust capacity, and at said time, said money belonged to his principal, Fred W. Raymond, and that he converted it to his own use with the full knowledge and consent of Fred W. Raymond, the defendant must be acquitted. Our attention has not been called to any evidence supporting the theory that the money was converted to the uses and purposes of the defendant, with the full knowledge or consent of Fred W. Raymond. The defendant's version of the transaction shows that the money had been converted previous to the alleged consent on the part of Raymond that it might be considered a loan.

[22] The court properly instructed the jury that the intent with which the act was committed was a matter entirely within their province and should be determined from all the testimony in the case. Likewise, the circumstantial evidence and direct evidence should be considered in determining their verdict, and that the testimony must be inconsistent with any reasonable theory of innocence, and must show the defendant's guilt beyond any reasonable doubt.

[23] From the foregoing it is evident, just as claimed by counsel for the people, that the four elements constituting embezzlement were contained and defined within the instructions given by the court to the jury, to wit: (1) That the defendant must have been acting in the capacity of an agent at the time of the conversion of the money; (2) that the defendant obtained and held the money in a trust capacity; (3) that the money taken belonged to Raymond; (4) that the defendant converted the money to his own use in violation of his trust.

As the instructions covered all the essential elements which we have mentioned, it follows that the court did not err in eliminating a repetition of such elements from the defendant's proposed instruction No. 9. A comparison of the refused instructions with the instructions given leads to the conclusion that all pertinent matters contained in the refused instructions were covered by the instructions actually given. From a careful consideration of the instructions, it is clear that no prejudice could possibly have resulted to the defendant from the refusal of the court to give the proffered instructions urged upon our attention.

[24] A review of the testimony which we have set forth, showing conclusively that this court could not order reversal on the grounds of a miscarriage of justice, would cure any technical defects or omissions in the instructions, as alleged by the appellant.

[25, 26] Lastly, it is contended that the court erred in refusing to grant appellant's motion for a new trial. This is based upon the fact that the Davis trust deed was brought to the attention of the appellant after the trial of this case had been terminated. It appears that this trust deed was in the possession of a witness by the name of Davenport. Davenport, when asked as to the whereabouts of the trust deed, replied as follows:

"Q. Where is the one that he gave back to you? A. Must have it in my papers.

"Q. And can you produce it? A. I don't know.

"Q. Will you produce it? A. I have a box of stuff; I will look through them."

Later on it appears that this witness looked through the box referred to and found the trust deed. However, the execution of the trust deed referred to by Davenport was fully testified to by the witness Davis, who, with his wife, had executed the same; so that all the facts concerning the same were before the jury before rendering its verdict herein. The fact of having the trust deed to exhibit to a jury would only be cumulative of the testimony already given.

We do not need to cite the cases to the effect that the granting or refusing of a new trial rests largely in the discretion of the trial court. Much less would this court be authorized to grant a new trial simply for the purposes of permitting the appellant to introduce cumulative evidence.

Finding no error in the record justifying a reversal, other than as herein stated, it follows that the conviction and judgment based upon count No. 3 in the indictment must be and the same is hereby set aside. The statute of limitations having run, no new trial is ordered as to the offense attempted to be charged in count No. 3.

It is further ordered that the order of the court denying a new trial as to count No. 1, and the judgment based thereon, be and the same are hereby affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

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2 Cal.App.2d 279

COWGILL v. RASMUSSEN.

Civ. 9398.

District Court of Appeal, First District,
Division 2, California.
Nov. 19, 1934.

1. Automobiles 🔑245(6, 72)

Where pedestrian crossing street had waited in center of street for automobile to pass and then stepped back in path of motorist, pedestrian's contributory negligence and motorist's negligence *held* for jury.

2. Trial 🔑260(1)

Refusal to give instructions already covered by other instructions is not error.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Vin R. Cowgill against Hans Rasmussen. Judgment for defendant, and the plaintiff appeals.

Affirmed.

Hugh L. Hagan, of Oakland, for appellant.

Decoto & St. Sure, of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for damages for personal injuries and the jury returned a verdict for the defendant.

[1] The evidence upon which the verdict was based shows that plaintiff alighted from a north-bound street car at about 9:30 p. m. at a point within a safety zone, walked to the north end of the safety zone, waited for some automobiles to pass, then walked due west to the center of the street. There she stopped to let south-bound machines pass, and while standing at that point stepped back in the path of defendant's machine which was traveling north on the north-bound street car tracks. There is no evidence of negligence of any character on the part of the defendant which would support a verdict for the plaintiff. There is a showing of contributory negligence on the part of the plaintiff which would support a verdict against her. The appeal seeks a retrial of these issues of fact in this court, but to do this we would have to disregard the settled rules which leave these issues with the jury.

[2] Criticism is directed to the refusal of the trial court to give certain proposed instructions relating to the relative rights of pedestrians and autoists at street crossings. In each instance the proposed instruction assumed a state of facts not supported by the record, and in each instance the jury was fully instructed on the issues arising from the evidence. In some instances the rejected instructions related to matters which were fully covered in the instructions given. Nothing is clearer than that, when the jury is fully and clearly instructed on the issues in-

volved, a reversal cannot be had because of the failure to give some cumulative instruction requested by the appellant.

The cause was fairly and fully tried and no error appears in the record.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

* * *

2 Cal.App.2d 65

KING CITY UNION HIGH SCHOOL DIST. et al. v. WAIBEL.

Civ. 9378.

District Court of Appeal, First District, Division 2, California.

Nov. 7, 1934.

Hearing Denied by Supreme Court Jan. 3, 1935.

1. Schools and school districts 🔑135(2)

Contract by school trustees employing district superintendent for four years, beginning July 1, *held* valid in absence of fraud or bad faith notwithstanding that contract was entered into January 10, before election of two new members of board and reorganization thereof on May 1 and was for services wholly to be performed after such reorganization (School Code, §§ 2.90, 2.92, 2.93, 5.41).

2. Schools and school districts 🔑52

School board is not regarded as different board because some of personnel has been changed at election, but such board is continuing body.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action for declaratory relief by the King City Union High School District and others against W. C. Waibel. From an adverse judgment, plaintiffs appeal.

Affirmed.

Rosendale, Scott & Thomas, of Salinas, for appellants.

C. F. Lacey, of Salinas, for respondent.

SPENCE, Justice.

This action for declaratory relief was brought by plaintiffs for the purpose of determining the validity of a contract entered into with defendant. The trial court sustained the contentions of defendant and declared that the contract was a "valid and subsisting contract and binding upon the parties thereto." Plaintiffs appeal from said judgment.

The trial court handed down a written opinion which correctly states the facts and which in our opinion correctly disposes of the question of law involved. We therefore adopt said opinion as part of the opinion of this court. It reads as follows:

"It appears by the stipulation and pleadings that the King City Union High School district is a regularly organized union high school district of the state of California employing more than eight teachers, and is under the control of a board of trustees consisting of five members.

"That on the 10th day of January, 1933, the board passed a motion to employ W. C. Waibel for the term ending July 1, 1933, as principal of said high school district, and at the same meeting passed a motion to elect him district superintendent of said district for the term of four years commencing on July 1, 1933, and ending June 30, 1937.

"Two new members of the board were elected on the last Friday in March, 1933, and the board as constituted at the time of the institution of this action consisted of three of the persons who were members when said action was taken and two new members.

[1] "Pursuant to said motions contracts were signed by Mr. Waibel and the board covering the two positions for the terms stated.

"The question presented is whether the contract of employment as district superintendent, having been entered into before the election and the seating of the two new members and reorganization of the board on the 1st of May, 1933, is valid, inasmuch as it is for services wholly to be performed after that date.

"Sections 2.90 and 2.92 of the School Code authorize such a district to employ a district superintendent for a period of four years, and section 2.93 provides that such superintendent must hold both a valid administration certificate and a valid teacher's certificate. Waibel held both certificates.

"Section 5.401 of the School Code provides: 'Persons requiring certification qualifications may be elected for the ensuing school year on or after the first meeting of the governing board of the district as reorganized on the first of May and each person so elected shall be deemed reelected from year to year except as hereinafter provided.'

"Plaintiff contends that this last section prohibits the school board from electing Waibel as district superintendent for a term to commence after that school year previous to a meeting held May 1, 1933, and cites a number of cases from other jurisdictions, most of which are found in a note in 70 A. L. R. 799, at page 805 et seq., which states the majority rule to be that where the contract of employment of a teacher is for a period of performance which lies wholly within the term of a succeeding board, the contract is invalid as being against public policy.

[2] "The court is of the opinion that where, as here, there appears to be no bad faith, fraud, and undue advantage taken, that it is not for the court to say that such a contract is against public policy simply because it was made in January and did not take effect until the beginning of the next school year. There is nothing in section 5.401 which inhibits such a contract, for this contract was made subsequent to May 1, 1932, and the board as then organized had power to employ a district superintendent for a period of four years. Under the laws of this state we do not regard a school board as a different board simply because some of its personnel has been changed at an election. Such a board is a continuing body and in legal contemplation the new board is the same board that entered into the contract. Cope v. County of Sutter, 206 Cal. at page 454, 274 P. 750.

"In that case the board of supervisors of Sutter county on December 5, 1922, employed the plaintiff to prepare plans and specifications for the extension of a bridge. The defendant there claimed that as the contract was made in December, between the time a new board was elected in November and the time such new board took office in January, that such contract is against public policy, because the outgoing board contracted in advance what the new board shall do, and the new board is thereby deprived of their legislative function, discretion and power to act for the best interests of the county. The Supreme Court held there was no merit in the contention for the reasons above stated. It is obvious that in that case the whole or at least practically the whole of the above work was to be performed after the first Monday of January, 1923.

"Our school laws are based on the theory that it is well to have a continuity of policy and personnel except for good cause. This is the spirit behind our so-called Teachers' Tenure Law (School Code § 5.500). If our Legislature had desired to limit the power of a school board to elect a district superintendent for a term of four years commencing at the beginning of the next school year, so that the board could not have elected a district superintendent for such a term until after the 1st of May next succeeding the commencement of that term, it would seem to the court that it has not done so. For there is no such limitation in sections 2.90, 2.92, or 2.93, and section 5.401 cannot be construed to apply to district superintendents, for that section applies only to those requiring certifications whose tenure is limited to one year. It is for the Legislature and not the courts to declare a contract such as this contract contrary to public policy, where the court cannot find in the legislative acts any such declaration of policy, and the legislative policy seems to be directly to the contrary."

In the foregoing opinion, the trial court refers to what it terms the "majority rule" as stated in the note in 70 A. L. R. 805. We believe, however, that the apparent conflict in the decisions is largely due to the varying statutory provisions in the several jurisdictions. This was pointed out in School District No. 9 v. Gigax, 69 Colo. 161, 170 P. 184, where numerous cases were distinguished and the contract was held to be valid. Many authorities are cited in that decision in support of the court's conclusion to which may be added the more recent cases of Gardner v. North Little Rock Special School District, 161 Ark. 466, 257 S. W. 73, and Tate v. School District No. 11 of Gentry Co., 324 Mo. 477, 23 S.W.(2d) 1013, 70 A. L. R. 771.

In 24 Ruling Case Law, 579, the text-writer states: "In the absence of an express or implied statutory limitation, a school board may enter into a contract to employ a teacher or any proper officer for a term extending beyond that of the board itself, and such contract if made in good faith and without fraudulent collusion binds the succeeding board. It has even been held that under proper circumstances a board may contract for the services of an employee to commence at a time subsequent to the end of the term of one or more of their number and subsequent to the reorganization of the board as a whole, or even subsequent to the terms of the board as a whole." Likewise, the text-writers in 29 L. R. A. (N. S.) 657, says: "Where there is no limit placed on the exercise of the power conferred upon school trustees or boards to contract with and employ teachers, a contract by such trustee or board employing a teacher for a term to commence or to continue after the expiration of the term of such trustee or board is valid, and binding upon their successors in office. (Citing cases.)"

In the instant case there was no express statutory limitation relating to the time at which the election of the district superintendent could be held. The only possible implied statutory limitation was that it should not be held at an unreasonable length of time before the commencement of the employment. Here the employment was to commence at the beginning of the school year on July 1, 1933, and it cannot be said that an election held in January, 1933, was held an unreasonable length of time before the commencement of the employment. It is apparently conceded here that the election was held and that the contract was made in good faith and without any fraud or collusion. Under these circumstances we are of the opinion that the mere fact that the election was held and the contract was entered into prior to the time of the reorganization of the board would not serve to invalidate the contract.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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2 Cal.App.2d 395

BAUM v. VANATTA et al.

Civ. 1551.

District Court of Appeal, Fourth District, California.

Nov. 24, 1934.

Appeal and error 🔑607(1)

Failure to demand preparation of transcript within 10 days after denial of motion for new trial by operation of law *held* not to bar consideration of transcript on appeal, where no notice was given of denial of motion (Code Civ. Proc. § 953a).

◆

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Ernest Baum, doing business under the name and style of Ernest Baum Products Company, against Willis N. Vanatta and Clara F. Vanatta, individually and doing business under the name and style of Vanatta Manufacturing Company. From the judgment, plaintiff appeals. On motion to dismiss appeal.

Motion denied.

Fred A. Wilson, of San Bernardino, for appellant.

Swing & Swing, of San Bernardino, for respondents.

BARNARD, Presiding Justice.

The respondents have moved to dismiss this appeal on the ground that the notice to the clerk to cause a transcript on appeal to be prepared and filed was not given or filed within ten days after the denial of a motion for a new trial, as required by section 953a of the Code of Civil Procedure. It appears that notice of entry of judgment was served and filed on May 9, 1934, that a notice of intention to move for a new trial was filed on May 17, 1934, that said motion was never acted upon and was denied by operation of law on July 8, 1934, that notice to the clerk to prepare a transcript was filed on July 25, 1934, and that objections to the settlement of the transcript on appeal were overruled and the transcript was approved on September 18, 1934. It is not contended that any notice of the termination of the proceedings for a new trial was given to the appellant, and both a clerk's transcript and a reporter's transcript were on file in this court at the time notice of this motion was filed.

The respondents contend that where a motion for a new trial is denied by operation of law, the appellant is deemed to have notice and the time for requesting the preparation of a transcript begins to run at the end of the statutory period within which a motion for a new trial might have been granted and that, under the facts here appearing, the transcript which has been filed may not be considered.

In support of this contention the respondents rely particularly upon Hughes v. De Mund, 195 Cal. 242, 233 P. 94, McArthur v. Paxton, 39 Cal. App. 608, 179 P. 521, and Bernschein v. Whitaker, 175 Cal. 130, 165 P. 523. While these authorities support the contention here made, the supporting statement in the opinion in Hughes v. De Mund, supra, is based upon a holding in Bernschein v. Whitaker, supra, to the effect that the ten days during which a demand for a record may be made under section 953a of the Code of Civil Procedure, commences to run immediately after the failure of the trial court to pass upon a motion for a new trial within the statutory time and that, in such a case, no notice is required since the law itself gives the notice.

In the later case of Anstead v. Pac. Gas & Elec. Co., 201 Cal. 198, 256 P. 209, where a demand for a transcript was made more than ten days after the denial by operation of law of a motion for a new trial and where notice of the termination of the proceedings for a new trial had not been given, the court held that the appellant was not in default in the absence of notice of the termination of the proceedings for a new trial and expressly overruled the case of Bernschein v. Whitaker, supra, in so far as the same was in conflict therewith. While it also appeared in the Anstead Case that the appellant had applied for and had been granted relief from any such default, the court, in its opinion, refers to this action as having been taken "apparently out of an abundance of caution." A similar holding is found in Preo v. Roed, 99 Cal. App. 372, 278 P. 928, and in Dreyer v. Cole, 210 Cal. 339, 292 P. 123, in both of which cases it was held that the fact that demand for the preparation of a transcript was not filed within ten days after denial of a motion for a new trial by operation of law, would not bar the consideration of such a transcript on appeal where no notice was given of the denial of the motion. The law in this respect seems now to be well settled and the respondents' contention is without merit.

The motion to dismiss the appeal is denied.

We concur: MARKS, J.; JENNINGS, J.

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2 Cal.App.2d 266

NAKAMOTO et al. v. TESTINO et al.

Civ. 8545.

District Court of Appeal, Second District,
Division 1, California.
Nov. 16, 1934.

Automobiles 🔑244(50)

Evidence *held* to sustain finding that deceased pedestrian, who was struck by automobile while crossing highway at night, was contributorily negligent in failing to look in direction from which automobile was approaching.

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by Frank Nakamoto and others against Louis Testino and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

David F. Hart, of Santa Maria, for appellants.

Preisker, Goble & Twitchell and Thomas P. Weldon, all of Santa Maria, for respondents.

HOUSER, Justice.

This appeal is based upon a judgment that was rendered in pursuance of a verdict returned by a jury in an action brought by the plaintiffs against the defendants for the recovery of damages alleged to have ensued to the plaintiffs by reason of the death of one Fusa Nakamoto, who was killed in a collision that occurred between her as a pedestrian and an automobile that was being operated at the time of such collision by defendant Alexander Testino.

Appellants urge several reasons as being sufficient for a reversal of the judgment; each of which being primarily dependent upon a conclusion by this court that the admitted facts incontrovertibly show that in the operation of his automobile at the time when the accident occurred defendant Alexander Testino was guilty of negligence that proximately caused the death of Fusa Nakamoto. On the other hand, the respondents assert that the evidence clearly established the fact that at all times in question defendant Alexander Testino operated his automobile in a careful and prudent manner, that the jury so found, and that its verdict is conclusive as to that fact; consequently that, the foundation for each of the points presented by the appellants being destroyed, such points are of no avail; moreover, that the special defense to the action that was interposed by the defendants of contributory negligence on the part of Fusa Nakamoto was in the same manner decided by the jury in the affirmative, and that likewise a decision by the jury in that regard, based upon substantial evidence to the effect that such contributory negligence existed on the part of Fusa Nakamoto was not only conclusive as to that ultimate fact, but also rendered immaterial any question as to the assumed (but not conceded) negligence of Alexander Testino. In that connection, in their reply brief appellants admit that "if the deceased was guilty of contributory negligence, the plaintiffs would not be entitled to recover. * * *" Thus, for the purpose of this appeal, the preliminary question is narrowed to a determination of whether the evidence adduced on the trial of the action was sufficient to authorize a finding that Fusa Nakamoto was guilty of contributory negligence.

The accident occurred at night on an east-and-west paved highway (and not at any street or road intersection), which Fusa Nakamoto was attempting to cross "at an angle" in a southerly direction. The automobile that was operated by Alexander Testino had its headlights burning, was traveling in an easterly direction, and just before colliding with Fusa Nakamoto was passed by another automobile, likewise with its headlights burning that was traveling westerly and was driven by a Mrs. Hulett. In part, Mrs. Hulett testified as follows:

"Q. Where was the woman with reference to the edge of the pavement when you first saw her? A. She was just getting ready to cross the pavement.

"Q. Which side? A. The north side.

"Q. When you saw her, what did she do? A. She started to cross the pavement.

"Q. Have you any idea how far you were away from her when you first saw her? A. No, just as far as my lights shone. I don't know how far that was.

"Q. When she started across, how did she move? A. A kind of a little run, half trot and walk.

"Q. Which way was she going? A. She was going south, on the south side of the pavement. * * *

"Q. Where was your car when she crossed? A. I did not have to get off the pavement to let her cross. Well, she was about a foot and a half from the middle of the road. * * *

"Q. Now all that time you had observed her, how did she travel, how did she conduct herself? A. All the time I saw her she was trotting, kind of trotting across the road.

"Q. Just describe her general actions. A. Her body, as she crossed that road, just as I got up pretty close to her she looked up at my machine. * * *

"Q. Now, during the time that she was crossing the road, the entire time, what direction did she look? A. She just looked up at my car, that is all I remember.

"Q. At times she was not looking up at your car, in what direction did she look? A. She was looking straight ahead, I suppose.

"Q. Just state how she went across the road, and if you can tell how she carried herself as she was crossing the road? A. She was trotting across the road and just as my car got real close to her she looked up.

"Q. Was that the only time she looked up? A. Yes, sir.

"Q. At that time where did she look? A. At my car.

"Q. Did she look in any other direction? A. Not that I know of. I did not see her."

Mrs. Testino, who was a passenger in the automobile operated by Alexander Testino, in part testified as follows:

"Q. While that woman was running, in which direction was she looking, Mrs. Testino? A. She was crossing right in front of the machine, and she was looking toward the ground.

"Q. Did she look in any other direction at all as long as you saw her? A. Not that I know of; not that I could see.

"Q. Did she look toward you at any time? A. She did not.

"Q. Where was she with reference to the center line of the street when your car struck her? A. She was about 2 feet past the center of the road. She was about 2 feet past the center of the road, right in front of her (?) machine.

"Q. On which side of the road, which side of the center? A. On the south side."

And defendant Alexander Testino testified as follows:

"Q. When you first saw the woman, what was she doing? A. She was trotting across from the north to the south side. * * *

"Q. In which direction was she trotting? A. Going on an angle, more like an angle than straight across. * * *

"Q. How far ahead, of you was she about, when you first saw her? A. Around 15 feet. * * *

"Q. When you hit her, which side of the highway were you on? A. When I hit the woman?

"Q. Yes. A. I was on my side of the highway, south.

"Q. Which side of the highway was she on when you hit her? A. She was on my side. * * *

"Q. Describe just exactly how the woman was going when she was going across the street. A. Her head was down on the paved part and she was not even looking at my car at all. She never even turned her head once up to my car at all. She just continued on, going across."

It thus appears that, notwithstanding presumptions or other evidence that may have been submitted for the consideration of the jury, that body was justified in determining the facts to be that in the nighttime Fusa Nakamoto started to cross a highway at a time when an automobile driven by Mrs. Hulett was approaching Fusa Nakamoto from the east, and at the same time the automobile operated by defendant Alexander Testino was approaching Fusa Nakamoto from the west; that, before attempting to cross said highway, Fusa Nakamoto failed to look in either direction until the car driven by Mrs. Hulett was very close to her; and that neither thereafter nor at all did she look in the direction from which the automobile driven by Alexander Testino was approaching.

In such circumstances, a finding by the jury to the effect that Fusa Nakamoto was guilty of contributory negligence is sustained in principle by so many authorities in this state that it is deemed unnecessary to cite them.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

* * *

2 Cal.App.2d 276

SAN JOSE PACIFIC BUILDING & LOAN ASS'N v. CORUM et al.

Civ. 9178.

District Court of Appeal, First District, Division 1, California.

Nov. 17, 1934.

Rehearing Denied Dec. 17, 1934.

Hearing Denied by Supreme Court Jan. 14, 1935.

1. Courts ⇒122

Superior court *held* not without jurisdiction of unlawful detainer proceeding on ground that record affirmatively showed lack of evidence as to monthly rental value of rental estate, where complaint alleged property to be worth $123,000 and rental value thereof $1,500 per month and asked for $3,000 damages (Code Civ. Proc. § 1161a; Civ. Code, § 2924).

2. Courts ⇒122

Where jurisdiction of court depends upon amount in controversy, complaint as a whole is to be examined to determine whether jurisdiction exists.

3. Courts ⇒121(2)

Failure to allow damages in unlawful detainer proceeding *held* not to affect jurisdiction, which attached by reason of amount in controversy and not by what plaintiff was found to be entitled to recover after trial.

4. Mortgages ⇒372(4)

Complaint in unlawful detainer proceeding *held* not insufficient because of failure to show service on subtenants of notice to quit (Code Civ. Proc. § 1161a; Civ. Code, § 2924).

5. Mortgages ⇒372(4)

Complaint in unlawful detainer *held* not insufficient as failing to allege taking of necessary steps to show valid sale under trust deed, where complaint alleged that plaintiff performed all conditions on its part required to be performed by statutes and by deed of trust (Code Civ. Proc. § 1161a; Civ. Code, § 2924).

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Summary proceeding in unlawful detainer by the San Jose Pacific Building & Loan Association against Augusta Corum and others. From a judgment for plaintiff, named defendant appeals, and plaintiff moves to dismiss the appeal or affirm the judgment.

Judgment affirmed.

Alfred J. Hennessy and George D. Collins, Jr., both of San Francisco, for appellant.

Breed, Burpee & Robinson, of Oakland, for respondent.

PER CURIAM.

This is a summary proceeding in unlawful detainer based upon section 1161a of the Code of Civil Procedure providing that, where property has been sold under section 2924 of the Civil Code under a power of sale contained in a trust deed and the title of the purchaser has been duly perfected, he may maintain against the trustor in possession a summary and special proceeding to remove him after first serving upon him and his subtenants a three days' notice to quit.

[1-3] It is alleged in the complaint and denied in the answer that the rental value of the property is $1.500 a month. It is also alleged that the reasonable value of the property is $123,000. Judgment went in favor of plaintiff for the possession of the premises. The appeal is taken on the judgment roll alone. The findings state that no finding is

made of the amount of the rental value for the reason that no evidence was offered upon the subject. It is appellant's main contention that, as the record affirmatively shows there was no evidence adduced as to the monthly rental value of the rental estate and no finding made for the specified reason, the findings as made do not support the judgment, and the latter is void for want of jurisdiction in the superior court over the case, as such court would have jurisdiction only in the event that the case was not within the jurisdiction of the justice's court. There is no merit in the contention. The complaint, as above stated, alleged the property to be of the reasonable value of $123,000 and the rental value thereof $1,500 per month. The complaint also asks for damages in the sum of $3,000. These averments manifestly bring the case within the jurisdiction of the superior court. Where the jurisdiction of the court depends upon the amount in controversy, the complaint as a whole is to be examined to determine whether or not jurisdiction exists. Hammell v. Superior Court, 217 Cal. 5, 17 P.(2d) 101. Here there is no question as to the good faith of the plaintiff in bringing his suit in the superior court. 7 Cal. Jur. 692; Gardiner v. Royer, 167 Cal. 238, 139 P. 75. The fact that no damages were allowed in no manner affected the jurisdiction. Jurisdiction attaches by reason of the amount in controversy and is in no manner affected by what the plaintiff is found to be entitled to recover after trial. Gardiner v. Royer, supra; 7 Cal. Jur. 694; Pratt v. Welcome, 6 Cal. App. 475, 92 P. 500; Becker v. Superior Court, 151 Cal. 313, 90 P. 689; Solomon v. Reese, 34 Cal. 28.

[4] Appellant next contends that, as the complaint fails to show service on the subtenants of notice to quit, such service upon them being a jurisdictional requirement, no cause of action is stated in the complaint. This contention is without merit. Tujague v. Superior Court, 69 Cal. App. 35, 230 P. 198; Telegraph Avenue Corporation v. Raentsch, 205 Cal. 93, 269 P. 1109, 61 A. L. R. 366.

[5] And finally, it is urged that the complaint fails to allege with sufficient certainty, or allege at all, the taking of the necessary steps going to show a valid sale. The complaint alleged that plaintiff duly performed and caused to be performed all the conditions on its part required to be performed by section 2924 of the Civil Code and all other provisions of law applicable thereto and all provisions contained in said deed of trust. This is all that was necessary. Ley v. Babcock, 118 Cal. App. 525, 527, 5 P.(2d) 620. In this connection respondent upon its motion to dismiss the appeal or affirm the judgment has filed an affidavit in which it is set forth that this question is moot by reason of the finality of two judgments, described in the affidavit attached to the motion, wherein the validity of all steps in the foreclosure proceedings were finally adjudged to be regular. Whether these judgments are res judicata against appellant's contention is unimportant considering the conclusion we have reached concerning the sufficiency of the complaint.

The judgment is affirmed.

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2 Cal.App.2d 255

ADLER v. WELLS FARGO BANK & UNION TRUST CO. et al.

Civ. 9248.

District Court of Appeal, First District, Division 1, California.
Nov. 16, 1934.

Hearing Denied by Supreme Court Jan. 14, 1935.

1. Jury 🔑25(6)

Failure to be present at time case is set for trial, or within five days after service of memorandum to place case on active list, or to serve and file demand for jury, constitutes waiver of right to trial by jury (Code Civ. Proc. § 631, subd. 4).

2. Appeal and error 🔑901

Error in proceeding to secure jury to be availed on appeal must affirmatively appear from record and where appellant alleges error, it is incumbent on him to show it affirmatively.

3. Appeal and error 🔑900

Appellate court will never presume that error was committed or that something was done, or omitted to be done which constitutes error, but every intendment and presumption not contradicted by, or inconsistent with record on appeal must be indulged in favor of orders and judgments of superior court.

4. Appeal and error 🔑901

Litigant complaining of errors committed by trial court, has duty to produce duly authenticated record affirmatively showing alleged errors.

5. Appeal and error ⚷685

Record on appeal which merely showed that at time case was ready for trial appellant demanded jury, but which failed to show that demand for jury was made when case was first set for trial, or that appellant had prior to trial made deposit of required jury fees with clerk, *held* not to show error in denying appellant trial by jury (Code Civ. Proc. § 631, subds. 4, 5).

◆

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Sol Adler against the Wells Fargo Bank & Union Trust Company, as executor of the last will and testament of Emma Hintze Levey, deceased. From a judgment for plaintiff, defendant appeals.

Affirmed.

Alfred Voyce and George M. Naus, both of San Francisco, for appellant.

Edgar C. Levey and Leon Samuels, both of San Francisco, for respondent.

JAMISON, Justice pro tem.

The only question presented for consideration on this appeal is whether or not the trial court erred in denying appellant a trial by jury.

This appeal was brought up on two bills of exception. The first of these sets forth that appellant served and filed a memorandum stating that the case was at issue and demanding a trial by jury. This demand for a jury was denied. The second bill of exceptions sets forth that when the case came on for trial the appellant again demanded that it be tried by a jury, and again this demand was denied by the court and the case was tried by the court and judgment rendered for plaintiff.

[1-4] Subdivision 4 of section 631 of the Code of Civil Procedure provides that a trial by jury may be waived as follows: "By failing to announce that a jury is required, at the time the cause is first set upon the trial calendar if it be set upon notice or stipulation, or within five days after notice of setting if it be set without notice or stipulation." The memorandum in the first bill of exceptions is not dated, nor does it state that the demand for a jury was made when the case was first set for trial. Failure to be present at the time the case is set for trial, or within five days after the service of the memorandum to place the case on the active list, to serve and file a demand for a jury, constitutes a waiver of the right to a trial by jury. McGregor v. Wright, 117 Cal. App. 186, 199, 200, 3 P.(2d) 624; Stern v. Hillman, 115 Cal. App. 156–159, 300 P. 972; I. S. Chapman & Co. v. Cramer, 118 Cal. App. 304, 4 P.(2d) 970. In order to be availed of on appeal, error in the proceeding to secure a jury must affirmatively appear from the record (15 Cal. Jur. 444), and where an appellant alleges error it is incumbent upon him to show it affirmatively, for where the record is silent it will be presumed that the lower court did its duty. (15 Cal. Jur. 445). The appellate court will never presume that error was committed, or that something was done or omitted to be done which constitutes error. On the contrary, every intendment and presumption not contradicted by or inconsistent with the record on appeal must be indulged in favor of the orders and judgments of the superior court. It is the duty of a litigant complaining of errors committed by a trial court to produce a duly authenticated record affirmatively showing the alleged error. 2 Cal. Jur. 852.

[5] We are of the opinion that the record on this appeal fails to show that appellant, in demanding that the case be tried by a jury, complied with subdivision 4 of section 631 of the Code of Civil Procedure.

The second bill of exceptions simply shows that at the time the case was ready for trial the appellant demanded a jury. There is no law authorizing this demand for a jury when the case is ready for trial. In addition to the requirements of subdivision 4 of section 631 of the Code of Civil Procedure, subdivision 5 of said section provides that a trial by jury may be waived by failing to deposit with the clerk within ten days prior to the date set for trial a sum equal to the amount of one day's jury fees payable under the law. There is no record showing that appellant had, prior to the trial of this case, made the said deposit with the clerk.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

PEOPLE v. COBLER.

Cr. 2585.

District Court of Appeal, Second District, Division 1, California.

Nov. 22, 1934.

Hearing Denied by Supreme Court Dec. 20, 1934.

1. Homicide ⇨332(2)

Jury's conclusions from substantial evidence in murder trial that death was result of strychnine poisoning, as charged, rather than intervening brain injury caused by fall, and that such injury was produced by strychnine *held* conclusive.

2. Homicide ⇨5

Fact that brain injury, produced by strychnine administered by defendant in murder trial, may have been fatal in itself and accelerated victim's death, did not relieve defendant from responsibility for poisoning.

3. Criminal law ⇨485(1)

In trial for murder by administering strychnine questions asked medical expert as to what symptoms occur after hard blow on head and what are symptoms of fractured skull *held* objectionable where witness in stating reasons for his opinion that brain injury caused victim's death included all symptoms and conditions shown by evidence theretofore given.

4. Criminal law ⇨485(1)

Trial court's order, necessitating defendant's inclusion in hypothetical question to expert witness of several facts omitted from original question, *held* not prejudicial error, where final answer was favorable to defendant.

5. Homicide ⇨308(5)

Evidence in trial for murder by administering strychnine *held* not to warrant instruction on second degree murder.

◆

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Rhoda Linn Cobler was convicted of first degree murder, and she appeals.

Affirmed.

Vincent A. Marco, of Hollywood, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

HOUSER, Justice.

From a judgment rendered in pursuance of her conviction of the crime of murder in the first degree, with the penalty therefor fixed at life imprisonment in the state prison, as well as from an order by which her motion for a new trial was denied, defendant has appealed to this court.

Briefly, the incriminatory evidence adduced on the trial of the action included a showing that, under the pretense given by defendant to a druggist that she wished to poison some gophers, defendant purchased fifteen grains of strychnine, which was placed in a paper wrapper and labeled "Poison." She registered with the druggist under an assumed name and a fictitious address. She did not use the strychnine for the asserted purpose for which the strychnine was purchased; but five days after such purchase was made by defendant, in preparing breakfast for her husband, she placed "about one-third" of such strychnine in a glass of milk and gave it to her husband to drink. However, before doing that, in the kitchen sink she burned the paper wrapper that had been the container of the strychnine. She also threw "down the sink" the remaining strychnine that she had not placed in the milk. After the husband had drunk some of the poisoned milk, he complained that he did not "feel good"; and very soon thereafter, in attempting to rise from a "Morris" chair in which he had been sitting, fell to the floor. In such fall his head first struck against a stone in the mantel of a fireplace, and again on an iron "smoking stand" that was practically demolished by reason of such contact. The defendant then called a doctor and other persons to assist in rendering aid to her husband, who died within about thirty-five minutes after drinking the milk that contained the poison. The attending physician testified that on his arrival at the home of defendant and her husband, he found the husband lying on the floor, unconscious, and undergoing convulsive seizures and rythmic contractions of the heart, lungs, abdomen, and facial muscles; which conditions continued until his death. The doctor further testified that the symptoms of strychnine poisoning were rythmic convulsions, spasms of the muscular system of the body, and spasmodic respiration at rapid rate; all of which were apparent with reference to Mr. Cobler's condition. Furthermore, that in his opinion, the cause of Mr. Cobler's death was strychnine poisoning, and that the blows on the head which he had received apparently at the time that he fell to the floor from the effects of such poison had not contributed to his death. Also, that at the time he saw Mr. Cobler, blood was coming from a minor laceration on the side of his head, which ran into his ear; but that such laceration would not cause death. Another doctor, who performed the autopsy on the body of Mr. Cobler, testified that in his opinion the cause of death was strychnine poisoning, and that a minimum amount of strychnine to be nonpoisonous in its effect on a human being is one-twelfth of a grain. A chemist testified that in 157 grams of stomach content of the deceased (which was about one-fourth to one-fifth of the total content of the stomach), he found one and one-half grains of strychnine; and that in 250 milligrams of the liver he found one-fiftieth of a grain of strychnine.

On her own behalf, defendant's testimony included the statement that her husband drank alcoholic liquor to excess; that she knew that strychnine was poisonous, but that she did not know its strength as such; that she gave the poison to her husband "to make him sick," in an effort to frighten him and thereby to stop his excessive indulgence in intoxicating liquor; and that when he fell to the floor "blood flowed out of his ear all over the floor; * * * came out of the inside of his ear."

Each of two doctors in effect testified that in his opinion "the man died of a fractured skull"; or "brain injury"; and based such opinion on the evidence regarding the symptoms and general conditions that were present preceding the death of the husband of defendant. Each of such doctors also stated that such symptoms or conditions were not typical of strychnine poisoning, but more properly were typical of brain injury.

[1, 2] Appellant has ably presented the point that, considering the evidence adduced on the trial, particularly that which related to the cause of death of the husband of appellant, necessarily the jury indulged in speculation in reaching its conclusion that death was produced by strychnine poisoning, rather than by a fall which resulted in a "brain injury." The precise point of appellant's argument appears to be that if it were established that before the strychnine had been absorbed into the blood stream and therefrom had acted upon the nervous centers or system of the body, the husband of defendant had suffered an intervening "brain injury" of such severity that it was the cause of his death, the defendant could not legally be convicted of his murder. But the answer to such suggestion is two-fold: First, provided that the evidence was substantial (which, in view of the testimony given by the two doctors introduced by the prosecution, cannot well be disputed) to the effect that death was the result of strychnine poisoning, the determination by the jury, both as to the direct cause of death and as to whether the "brain injury" was produced by the effect of strychnine, was conclusive. And, secondly, notwithstanding the fact assumed by appellant that the "brain injury" was the cause of death, the principle of law is well established that if the strychnine taken by Mr. Cobler was sufficient to cause his death, the fact that the "brain injury" sustained by him was produced by the effect of the strychnine, may have been fatal in itself and accelerated the death of the victim, cannot have the effect of relieving defendant from responsibility for her act in administering the poison in the first place. People v. Lewis, 124 Cal. 551, 554, 57 P. 470, 45 L. R. A. 783; People v. Fowler 178 Cal. 657, 668, 174 P. 892.

[3] Appellant urges the point that the trial court committed prejudicial error against her defense to the action in sustaining an objection interposed by the prosecution to each of two questions that were asked by defendant of a doctor who had qualified as an expert witness. By such questions it was sought to be ascertained (1) what "symptoms" occur "after a hard blow on the head," and (2) what were "symptoms of a fractured skull." Although it appears that neither of such questions was answered directly, the record discloses the fact that in giving his reasons for his opinion that the cause of death was "brain injury," the doctor included therein all the symptoms and conditions which the evidence theretofore given had shown were present. So that, in any event no harm resulted to defendant from the ruling of which complaint is made.

[4] Another complaint is registered by appellant to the effect that on propounding a hypothetical question to a witness, on objection made by the prosecution, by order of the trial court it became necessary to include in such question several facts which were in evidence but which had been omitted from the question as originally propounded. Again, the record shows that, notwithstanding the inclusion in the question of such originally omitted facts, the answer to the question as finally given by the witness was altogether in favor of defendant; from which it follows that the point suggested by appellant is untenable.

[5] Appellant predicates prejudicial error affecting her defense upon the fact that the trial court refused to give to the jury a cer-

tain instruction which dealt with the possibility that defendant was guilty of murder in the second degree. But clearly on the evidence, rightly there could be no verdict by the jury that murder in the second degree had been committed by defendant. She was either guilty of murder in the first degree, or she was innocent of the commission of any homicide. She was not entitled to have the proffered instruction given to the jury.

The judgment and the order by which the motion for a new trial was denied are affirmed.

We concur: CONREY, P. J.; YORK, J.

CAL.REP.37–38 P.2d—21

2 Cal.2d 8

GLOBE INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 14706.

Supreme Court of California.

Nov. 26, 1934.

1. Master and servant 🔑373

Compensation will be granted for injuries due to assaults by fellow-employees where they are fairly traceable to incident of employment, and will be denied where they are result of personal grievances unconnected with employment (St. 1917, p. 831, as amended).

2. Master and servant 🔑373

Injury sustained by hotel waiter who was stabbed by employee at kitchen salad and dessert counter in altercation over order *held* compensable as "arising out of and in course of employment," where waiter was not the aggressor (St. 1917, p. 831, as amended).

[Ed. Note.—For other definitions of "Arising out of Employment" and "Course of Employment," see Words & Phrases.]

In Bank.

Proceeding for compensation under the Workmen's Compensation Act by Aloysius Marmurowicz, employee, opposed by the Globe Indemnity Company, insurance carrier. To review a decision of the Industrial Accident Commission awarding compensation to the claimant, the insurance carrier prosecutes a writ of review.

Award affirmed.

J. L. Kearney, of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

WASTE, Chief Justice.

The respondent Marmurowicz was employed as a waiter in the dining room of the Barker Hotel in the city of Los Angeles on August 27, 1933. At this same time a Miss Marshall was employed in the kitchen of said hotel. The latter was stationed at the salad and dessert counter and, among other things, was required to prepare and deliver to the respective waiters the salads and desserts ordered by them for patrons. On the day above mentioned Marmurowicz, in the course and scope of his employment, had placed an order of ice cream with Miss Marshall. Apparently the order was not immediately attended to whereupon, according to his testimony, Marmurowicz on at least two subsequent occasions repeated the order. He then asked or demanded why the order of ice cream was not filled, and an argument ensued as to whether he had placed such an order. In the course of the argument Miss Marshall told Marmurowicz to "shut up," and then referred to him as a "dirty Polack." With this remark Marmurowicz walked around and in back of the counter and in the general direction of Miss Marshall, saying, "What was that you called me?" Other expressions passed between the parties. As to these the witnesses were either uncertain or in conflict. At the time Marmurowicz went behind the counter he had nothing in his hands. The evidence is contradictory as to whether he touched Miss Marshall. She testified that he seized her two arms, and that in self-defense she picked up a long-bladed knife with which, in the resulting mêlée, Marmurowicz was stabbed in the chest, the blade penetrating approximately six inches. Marmurowicz, on the other hand, denies that he touched Miss Marshall, and testified that, as he entered the narrow space behind the counter, she again told him to "shut up," and that he was then stabbed by a knife held by her. He was uncertain whether the stabbing was deliberate or accidental. The lady in charge of the kitchen testified that she did not see Marmurowicz strike at or in any way tussle with Miss Marshall prior to the stabbing, that he was not of a quarrelsome nature and was well liked, and that Miss Marshall had previously engaged in arguments with other employees. Marmurowicz accounted for his presence behind the counter by testifying that after Miss Marshall called him a "dirty Polack" he sought to personally procure the desserts he had ordered. This latter testimony was contradicted by Miss Marshall, who testified that he approached her with "fire" in his eyes, and that she thereupon seized the knife as a means of protection. She also testified that it was "against the rules and regulations of the hotel kitchen" for the waiters to go behind the counter and serve themselves. In this latter respect she was contradicted by the lady in charge of the kitchen, who testified that it was "common practice" for the waiters to go behind the salad and dessert counter and personally fill their orders. The foregoing briefly narrates the circumstances surrounding the stabbing. The testimony of the principals is highly contradictory in other particulars which we shall not here attempt to designate.

Marmurowicz filed an application for adjustment of claim, and at the conclusion of the hearing thereon the respondent commission found that he "sustained injury occurring in the course of and arising out of his employment." On this finding an award of temporary disability and for reimbursement for medical expense was made in his favor. The employer's insurance carrier seeks by this petition to have the same annulled on the ground that the injury to Marmurowicz was the result of a personal altercation between employees in which he was the aggressor and that said injury is not therefore compensable under the Workmen's Compensation Act (St. 1917, p. 831, as amended). The commission, on the other hand, contends, in effect, that the rule relied on by petitioner is not applicable to a set of facts such as is here presented wherein the altercation between employees arose over an incident to the employment.

[1, 2] We are not inclined to annul the award of the respondent commission. In so concluding we are not unmindful of the authorities which preclude an award of compensation for injuries resulting from "horse play" between fellow employees (Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 P. 212, L. R. A. 1916F, 1164), or for injuries growing out of an altercation engendered by pre-existing ill will or personal animosity between such employees unconnected with and disassociated from the employment. Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 706, 151 P. 398. In our opinion this cause should be governed by the rule recognized in the more recent cases permitting an award of compensation for injuries received in an altercation between employees growing out of the proper discharge of the employment. The latter rule is best typified by the case of San Diego & A. Ry. Co. v. I. A. C., 193 Cal. 341, 343, 223 P. 972, 973, wherein the injured employee was shot by a fellow employee. The circumstances surrounding the injury and the rule applied thereto are set forth in the following portion of the decision therein: "From all the facts and circumstances surrounding the fatal shooting affray, we are convinced that the Industrial Accident Commission was justified in concluding that the assault upon Rote occurred in the course of and actually arose out of his employment. The shooting took place while Rote was actually performing a duty in the course of his employer's business at the roundhouse. It arose out of the employment and was incident thereto, in that the assault grew out of circumstances occurring in the course of his work and not out of any prior or personal quarrel. Giving full weight to the contention of petitioner that Trott, the roundhouse foreman, was angered by the visit and message of Rote that Trott cease blowing the roundhouse whistle at night, and that bad feeling resulted between Trott and the decedent therefrom, we are unable to accept petitioner's point of view that the injury can be considered only as one arising out of a prior and personal quarrel. From the beginning of the incidents which led up to the killing, the relations between the two men actually arose out of the work of the two employees in the service of the petitioner."

Again, in Globe Indemnity Co. v. I. A. C., 193 Cal. 470, 471, 225 P. 273, 274, this court had occasion to give expression to this more liberal rule. The cited case had to do with injuries growing out of an altercation between the cook and dishwasher of a restaurant as to the presence of unwashed dishes in the sink which the cook desired to use. In that case we declared: "The record is replete with evidence from which the respondent commission was justified in finding that the injured cook was not the aggressor, and that there was not any prior or personal quarrel or bad feeling between the two men, preceding the incidents of the morning in question, or that arose out of any circumstances extraneous to the employment in which they were at that time engaged. The evidence also shows that neither of the participants in the dispute was unusually quarrelsome, except that the employer testified that he thought Griffith, the dishwasher, had rather a quick temper. Under these circumstances the commission was justified in allowing compensation to Kopp. The injury was clearly one arising out of and in the course of his employment, within the meaning of the Workmen's Compensation Act (St. 1917, p. 831). Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 706, 151 P. 398; Warren Construction Co. v. Industrial Acc. Comm., 64 Cal. App. 260, 221 P. 381. It was received while Kopp was actually performing a duty in the course of his employer's business, and can fairly be said to be an incident of such employment. San Diego & Ariz. Ry. Co. v. Industrial Acc. Comm., 193 Cal. 341, 223 P. 972."

From this examination of the authorities we conceive the rule to be that compensation will be granted for injuries due to assaults by fellow employees where the same are fairly traceable to an incident of the employment, and will be denied where they are the result of personal grievances unconnected in any way with the employment. The record in the present case indisputably indicates that the altercation leading to the injuries for which compensation was awarded to Marmurowicz arose out of an incident to the employment. Of course, this alone would not warrant an award if Marmurowicz was, in fact, the aggressor. Globe Indemnity Co. v. I. A. C., supra; Wilson v. Carter, 14 I. A. C. 78; Turner v. I. A. Comm., 17 I. A. C. 119. However, in view of the uncertainty and sharp conflict in the evidence as to the nature and extent of the remarks preceding the quarrel and as to which person first laid hold of or struck the other, we are of the opinion that the respondent commission's implied finding that Marmurowicz was not the aggressor must be sustained and the award affirmed. It is so ordered.

We concur: SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; THOMPSON, J.; SEAWELL, J.

2 Cal.2d 4

METROPOLITAN WATER DIST. OF SOUTHERN CALIFORNIA v. SUPERIOR COURT IN AND FOR RIVERSIDE COUNTY et al.

L. A. 14809.

Supreme Court of California.

Nov. 20, 1934.

1. Municipal corporations 🔑271

Supplying water to inhabitants of city is legitimate municipal function.

2. Judges 🔑49(1)

Statute disqualifying judges of superior court for county in which realty affected by action by or against irrigation, reclamation, levee, swamp land, or drainage district, or any public agency was located, was not intended to apply to water district, so that water district was entitled to have superior court judges of county where district was located proceed with condemnation proceedings by district (Code Civ. Proc. § 170, subsec. 6; Gen. Laws 1931, Act 9129).

In Bank.

Original mandamus proceeding by the Metropolitan Water District of Southern California against the Superior Court of the State of California, in and for the County of Riverside, and the Honorable O. K. Morton and another, as Judges thereof.

Peremptory writ of mandate issued.

James H. Howard, Gen. Counsel, and Charles C. Cooper, Jr., both of Los Angeles, and A. Heber Winder, of Riverside, for petitioner.

Albert Ford, of Riverside, for respondents.

THOMPSON, Justice.

This is an original proceeding in mandamus to compel the respondent superior court in and for the county of Riverside and the respondents Hon. O. K. Morton and Hon. G. R. Freeman, as judges thereof, to vacate and set aside a voluntary order disqualifying themselves to sit or act in eminent domain proceedings now pending in the respondent superior court, entitled "The Metropolitan Water District of Southern California, a municipal corporation, plaintiff, v. Henry Upton et al., defendants," and numbered 24185 therein, and to compel respondents to proceed with the trial and determination of the action. The return to the alternative writ of mandate issued out of this court was made by general demurrer to the petition.

The order of disqualification was made not by reason of any actual bias or prejudice, which is eliminated from consideration herein, but "under and by reason of the provision of subsection 6 of section 170" of the Code of Civil Procedure, which, so far as relevant to the question here raised, provides: "In an action or proceeding brought in the superior court or justices' court by or against the reclamation board of the state of California, or any irrigation, reclamation, levee, swamp land or drainage district, or any public agency, or trustee, officer or employee thereof, affecting or relating to any real property or an easement or right of way, levee, embankment, canal, or any work provided for or approved by the reclamation board of the state of California, the judge of the superior court of the county * * * in which such real property, or any part thereof, or such easement or right of way, levee, embankment, canal or work, or any part thereof is situated shall be disqualified to sit or act, and such action * * * shall be heard and tried by some other judge of the superior court, requested to sit therein by the chairman of the judicial council * * * unless the parties to the action shall sign and file in the action or proceeding a stipulation in writing, waiving the disqualification in this subdivision of this section provided. * * *" The respondent judges are of the opinion that they are disqualified by this section to hear and determine eminent domain proceedings instituted by the petitioning district to condemn lands in Riverside county, on the theory that petitioner comes within the term "other public agency" as used in subdivision (6).

Petitioner is alleged in the petition to be "a municipal corporation, duly organized, existing and functioning under and by virtue of the Constitution and laws of the state of California, particularly under and by virtue of that certain statute known as 'The Metropolitan Water District Act' (Stats. 1927, c. 429, p. 694, and amendments thereto, Deering's Gen. Laws of 1931, p. 5229, Act 9129)." Its contention that no disqualification arises by reason of subsection 6 of section 170, supra, is made upon the theory that the disqualification there imposed is limited to public agencies similar in character to irrigation, reclamation, levee, swamp land, and drainage districts, and that petitioner being a public or municipal corporation, it is so dissimilar in character to the enumerated state agencies that it does not come within the purview of the section. In support of this contention we are cited to many cases distinguishing this type of district from the improvement districts mentioned in the statute under consideration (the differences being summed up in Morrison v. Smith Bros., Inc., 211 Cal. 36, 293 P. 53), and to the cases of Tocque v. Superior Court, 64 Cal. App. 494, 222 P. 181, and City of San Diego v. Andrews, 195 Cal. 111, 231 P. 726, holding that the disqualification imposed by subsection 6 of section 170, supra, does not extend to municipal corporations of general powers. Petitioner also relies upon numerous cases classifying municipal and metropolitan water districts as quasi municipal corporations. Henshaw v. Foster, 176 Cal. 507, 169 P. 82; City of Pasadena v. Chamberlain, 204 Cal. 653, 269 P. 630; Wheatley v. Superior Court, 207 Cal. 722, 279 P. 989. See In re Orosi Public Utility Dist., 196 Cal. 43, 235 P. 1004.

[1, 2] As already indicated, the supplying of water to the inhabitants of a city is deemed to be a legitimate municipal affair. City of Pasadena v. Chamberlain, supra. Under the Metropolitan Water District Act two or more municipalities may join for the purpose of conducting for each a legitimate municipal affair, i. e., the supplying of water to the inhabitants of each. It is true that the district is authorized to go beyond the municipal affairs of one municipality—but it does not transcend a proper municipal function of the cities as a combined unit. Were we to hold with respondents' contention we would be faced with a strange anomaly. Under the cases of Tocque v. Superior Court, and City of San Diego v. Andrews, supra, the cities composing the metropolitan water district might bring actions, or conceivably might join in an action affecting real property, and a disqualification of the judges of the county wherein the property was situate would not necessarily result. And yet if they act through a common instrumentality or agency a disqualification necessarily follows. It is difficult to believe that such a result was ever contemplated by the Legislature. In fact, we find evidence to the contrary. Reverting to the section for a moment we read: "or any public agency, or trustee, officer or employee thereof, affecting or relating to any real property or an easement or right of way, levee, embankment, canal, or *any work provided for or approved by the reclamation board of the state of California*." (Italics ours.) It is manifest from the quotation that the Legislature was dealing with the subject of reclamation work whether done under one name or another, in which undertakings the included lands are assessed in proportion to the bene-

fits derived therefrom, and did not have in mind the supplying of domestic water to the inhabitants of one or more municipalities. In the former there is apt to develop, as has been pointed out in earlier opinions, great differences of opinion concerning benefits and assessments, the character of and the manner of doing the work, which vitally affect the interests of the landowners in different sections of the district. In the latter, however, there is a unity of interest in the common source of supply, and its economical construction and management as well as in the taxes if necessary to be levied. Bearing in mind this difference and the fact, as is pointed out in Morrison v. Smith Bros., Inc., and in Pasadena v. Chamberlain, supra, that a district such as petitioner more closely resembles a municipal corporation than it does a state agency such as irrigation and reclamation districts, we are bound to conclude that the legislature intended, by the inclusion of the latter type only, to exclude the former. The respondent judges not being disqualified, the petitioner is entitled to be relieved of the order, and to have respondents proceed with the trial and determination of the action.

It is ordered that the peremptory writ of mandate issue.

We concur: WASTE, C. J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.; SHENK, J.

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2 Cal.App.2d 380

MIOLA v. NEWHOUSE.

Civ. 8710.

District Court of Appeal, Second District, Division 2, California.

Nov. 22, 1934.

1. Automobiles 🔑245(78)

Where truck driver was killed in collision with automobile with which defendant had attempted to make a U-turn just before reaching intersection, whether truck driver was contributorily negligent as regards speed with which he entered intersection or otherwise *held* for jury (St. 1931, p. 2126, § 131).

2. Automobiles 🔑206

Approaching drivers may assume that motorist attempting to make a U-turn on well-traveled highway will comply with statute and yield right of way to any vehicle approaching from opposite direction (St. 1931, p. 2126, § 131).

3. Evidence 🔑14

It is common knowledge that accidents between motor vehicles can occur with rapidity that precludes clear and definite observation of details.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Margherita Miola against W. A. Newhouse. From a judgment for plaintiff, defendant appeals.

Affirmed.

Blackstock & Rogers and Charles F. Blackstock, all of Oxnard, for appellant.

Norris Montgomery and Butcher & Haines, all of Santa Barbara, for respondent.

SCOTT, Justice pro tem.

Plaintiff's son, Albino Miola, was killed in an automobile collision involving a truck driven by him and a sedan operated by defendant. From judgment for plaintiff for damages for her son's death, based upon the verdict of a jury, defendant appeals on the sole ground that deceased was guilty of contributory negligence as a matter of law.

Immediately prior to the accident, while it was daylight, appellant was proceeding south and deceased was going north on Milpas street, in the city of Santa Barbara, near the intersection of Canon Perdido. At that point Milpas is 39 feet from curb to curb, and Canon Perdido is 24½ feet as it intersects Milpas on the east side. As appellant, going south, approached the intersection, he swerved to the right and then turned left to make a U-turn so as to head his sedan north. When he started to turn and his car was about 3 feet from the exact center of the street, headed southeast, the truck driven by deceased was 40 feet south of the intersection, coming north, and deceased started to slow up from the speed of 30-40 miles per hour at which he had been traveling. Appellant had nearly completed the turn and the sedan was headed about 20 degrees east of north, in the northeast quarter of the intersection, when the truck, which had entered the intersection at 20 miles per hour, struck the right front fender of the sedan, caromed off into Canon Perdido, striking the north curb with the left side of the truck, overturning on its side and killing deceased.

The above statement as to the facts is based on a view of the evidence which is most favorable to respondent, chiefly that of one Mazzia, companion of deceased on the truck.

[1] The sufficiency of the evidence to establish negligence of appellant is not questioned on this appeal, but it is contended that deceased was guilty of contributory negligence effectively barring recovery. This was a question of fact determined by the jury adversely to appellant's contention, and we are not inclined on the record before us to say that its decision was without any substantial evidence to support it.

[2] Milpas street, on which the collision occurred, is a well-traveled through highway, with boulevard stop signs posted at intersections leading into it. When a motorist, such as appellant, undertakes to make a U-turn on such a thoroughfare, approaching drivers may assume that he will be governed by the provisions of section 131 of the California Vehicle Act (St. 1923, p. 560, § 131, as amended by St. 1931, p. 2126), which requires that the motorist turning to the left shall yield to any vehicle approaching from the opposite direction which is so close to the intersection as to constitute an immediate hazard. In this connection it might be noted that the sedan going 8 miles an hour would cover but 12 feet in a second, while the truck, if going at 30 miles per hour, would go a distance of 45 feet in a second. As the sedan was completing the turn, just before the impact, there was a space of 6 to 8 feet between it and the curb, through which it may have appeared to deceased as a reasonable man that he could pass without hitting the sedan; and his failure to pass safely may have been due to a failure of the sedan to turn as completely or go as rapidly as deceased might reasonably have expected. These are matters which are properly considered and determined by the jury and by the trial court in passing on the motion for a new trial.

Even if we assume for the purposes of this decision that entry into the intersection at 20 miles per hour was negligence per se, the further question of whether any such negligence was a contributing cause of the accident was one of fact for the jury. Since from the evidence a reasonable man might have concluded that it was not such a contributing cause, this court cannot declare that it was as a matter of law.

[3] It is common knowledge that accidents between motor vehicles can occur with rapidity which precludes a clear and definite observation of details. Jurors whose acquaintance with streets in their own city especially qualifies them to visualize the occurrence were selected by the parties to this action to sit as triers of the facts. Those jurors have heard the evidence, have seen the witnesses, and have considered the testimony in the light of their common knowledge, and the conclusion which they reached cannot be disturbed on the basis of the record before us.

Judgment affirmed.

We concur: STEPHENS, P. J; CRAIL, J.

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2 Cal.App.2d 228

PEOPLE v. McFADDEN.

Cr. 2623.

District Court of Appeal, Second District, Division 1, California.

Nov. 14, 1934.

Criminal law 🔑651(1)

In prosecution for committing lewd act on child where defense was inherent improbability of testimony that offense was committed in automobile, accused's request for inspection of automobile by jury *held* properly refused (Pen. Code, § 288a).

Appeal from Superior Court, Los Angeles County; M. G. Woodward, Judge.

John J. McFadden was convicted of an offense, and he appeals.

Affirmed.

Olin N. Mackay, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

PER CURIAM.

By information in two counts the defendant was charged of the crime of violation of section 288a of the Penal Code, a felony. On each count the verdict found the defendant guilty of attempted violation of said section of the Penal Code. Separate judgments were entered. The defendant appeals from each judgment and from an order denying his motion for a new trial.

The grounds of appeal as stated by counsel for appellant are that because of inherent improbability of the testimony of the prosecuting witness, the evidence on each count is insufficient to sustain the conviction; and that the court erred in refusing to permit the jury to view the automobile in which the crimes are alleged to have been committed. After reading the record of the trial, we are of the opinion that the verdict of the jury is well sustained by the evidence, and that the discretion of the court was properly exercised in its ruling against the defendant's request for an inspection by the jury of the said automobile.

The judgments are, and each of them is, affirmed. The order denying motion for new trial is affirmed.

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2 Cal.App.2d 341

ISAACS v. FRANK MELINE CO.

Civ. 8421.

District Court of Appeal, Second District, Division 1, California.
Nov. 20, 1934.

Rehearing Denied Dec. 12, 1934.

Hearing Denied by Supreme Court Jan. 17, 1935.

1. Principal and agent 🔑151(3)

Where neither brokers nor their salesman informed client that salesman brokers had placed in charge of exchange of properties was no longer in brokers' employ, salesman completed exchange, and brokers did not request cancellation of salesman's license as their employee until later, brokers were bound by salesman's acts in continuing negotiations for exchange of properties (Civ. Code, §§ 2317, 2318).

2. Principal and agent 🔑151(3)

Acts of an agent after his authority has been revoked bind principal as against third person who, in absence of notice of revocation of agent's authority, relies upon its continued existence (Civ. Code, §§ 2317, 2318).

3. Brokers 🔑38(7)

In client's action against brokers for losses sustained through exchange of properties induced by brokers' alleged fraud, allowance of interest on damages from date of exchange *held* discretionary (Civ. Code, § 3288).

4. Brokers 🔑38(7)

In client's action against brokers for losses sustained through exchange of properties induced by brokers' alleged fraud, allowance to client of amounts paid as commission, escrow fees, and for title search *held* error, since measure of client's damages was value of what she gave for worthless note and trust deed, which court had already allowed her (Civ. Code, § 3333).

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action by Edith B. Isaacs against the Frank Meline Company. From a judgment for plaintiff, defendant appeals.

Modified and affirmed.

Walter H. Hewicker, Gibson, Dunn & Crutcher, and E. H. Conley, all of Los Angeles (Robert F. Schwarz, of Los Angeles, of counsel), for appellant.

Frank F. Oster and George W. Downing, Jr., both of Los Angeles, for respondent.

HAHN, Justice pro tem.

The action which gives rise to this appeal is one wherein plaintiff sought a judgment against defendant for damages alleged to have been suffered by her as a result of losses she sustained in an exchange of properties, which exchange she asserts she was induced to make through the fraud and deceit of defendant's employees and agents. The complaint sets forth with considerable detail the acts and representations which are alleged to have constituted the fraud and deceit charged. The trial court found that all of the allegations of the complaint were true. Inasmuch as we have come to the conclusion that there is sufficient evidence to support the court's finding on the issue of fraud and deceit, it will serve no useful purpose to extend this opinion with a detailed recital of the allegations of fraud and deceit set forth in the complaint, or to attempt a résumé of the evidence relating to that issue.

The main question which we feel is determinative of this appeal arises in the contention of appellant that the evidence does not support the court's finding that William D. Roberts was at all times during the negotiations for, and consummation of, the exchange of properties, an employee and agent of defendant and acting for defendant.

The record justifies the following brief outline of evidence which we deem pertinent to a discussion of the question of defendant's responsibility for the losses suffered by plaintiff in her exchange of properties:

On July 1, 1927, plaintiff called at the Ambassador office of defendant corporation, which was and is engaged in a realty brokerage business, and there met Clarence A. Lind, vice president of defendant, and in charge of its sales department. To him plaintiff stated that she owned a triplex apartment house on Rampart street, which she valued at $20,000, upon which there was a $6,500 mortgage, which she wished to sell; that she came to the office of defendant because she had been informed it was a thoroughly reliable and responsible concern. When Lind advised her that there was little prospect of securing a cash purchaser for the property, but that he could get her an advantageous exchange, plaintiff stated that she was wholly unfamiliar with property values, and therefore expressed reluctance to make an exchange. Lind assured her that the defendant company would faithfully protect her in any exchange it proposed; that she could safely trust defendant and rely upon any advice it or any of its officers or employees gave her in connection with an exchange. Plaintiff stated that, if sne made an exchange, she wanted property that she could promptly sell for the amount of her equity. Upon Lind's assurance that defendant could and would accomplish an exchange for her that would meet her expressed wishes, plaintiff listed her property with defendant for exchange. Lind informed plaintiff that the defendant company had in its employ a licensed salesman, one William D. Roberts, who was a competent and experienced man in exchanges, and one who was thoroughly reliable, and that he would intrust to Roberts the matter of securing for her an exchange for her property. Lind also assured plaintiff that he himself would pass on any property offered to her for trade, and that any trade which was recommended to her would have the backing of defendant company.

A few days later Roberts called upon plaintiff at her home, at which time she explained to him, as she had to Lind, the purpose she had in making a trade and the necessity for securing property that she could convert into cash. Also that she was inexperienced in such transactions and would have to rely upon his recommendations as to any deal he proposed. Roberts assured her that she could safely rely upon him and that he would protect her interests. During the following several weeks Roberts was active in securing and presenting for her consideration several prospective trades, none of which proved satisfactory. During this time Roberts kept Lind informed as to his activities and the trades presented to plaintiff. Some time in the early part of September, the evidence does not disclose the exact day, Roberts brought to plaintiff for consideration a proposal whereby one B. C. W. Block offered to exchange for plaintiff's property contracts for the purchase of cabin sites in Santa Susana pass of the face value of $13,500. Roberts recommended to plaintiff that she make the proposed exchange—indeed, he urged her to do so, telling her that he knew the property, that the contracts were good and would be paid, and that she could not find a better exchange for her property than the one proposed. Upon his recommendation, plaintiff agreed to make the exchange, and upon Roberts' suggestion accompanied him to the office of the Guaranty Building & Loan Association which he suggested as the escrow through which the exchange would be consummated.

Some ten days later, at Roberts' request, plaintiff again with Roberts called at the escrow office, at which time she was informed that, instead of the cabin site purchase contracts, Block had put in escrow for exchange a note for $13,500 signed by one Reginal Spears, which note was secured by a trust deed on ten acres of land in Santa Susana pass. When plaintiff protested that this note and trust deed were not what she had agreed to trade for, Roberts replied that, after he had given the matter further consideration, he concluded that it would be better for her to have this trust deed and note than to purchase contracts of the cabin sites; that the land which was put up as security was worth from $2,000 to $2,500 an acre; that the deal was a marvelous deal for her and absolutely the best that she could secure; that he had gone over it thoroughly and had discussed it with Mr. Lind, and that Mr. Lind had given it his approval; that plaintiff might place absolute reliance in his recommendation because defendant company was back of him; that Reginal Spears, the maker of the note and trust deed, was thoroughly reliable in a financial way; that Spears had fulfilled other contracts to pay money; that Block had such confidence in his reliability that he (Block) would guarantee the note; that the proposed trade was an excellent one for her.

[1] Relying upon these and other similar representations made by Roberts and Block, all of which were by the findings found to be false and untrue and made for the purpose of defrauding plaintiff, plaintiff agreed to accept the note and trust deed in place of

the cabin site contracts. Some time between September 15th and 20th, the exact date not appearing, Roberts terminated his employment as salesman for defendant. Plaintiff was not informed of this change in Roberts' relation with defendant, but continued with the negotiations for this exchange until it was fully consummated in the belief that Roberts was at all times the agent and in the employ of defendant. Neither Roberts nor defendant gave her any information to the contrary. While the exchange was finally consummated after the date Roberts severed his relations with defendant, the evidence justifies the inference that the negotiations were under way when Roberts ceased his employment with defendant. Not until November 4, 1927, did defendant request of the state real estate commission the cancellation of Roberts' license as a salesman in its employ. Under these circumstances, it was clearly the duty of defendant to have notified plaintiff of the fact that Roberts was no longer a salesman in its employ, if it would be relieved of responsibility for Roberts' conduct in continuing negotiations for an exchange of her property. Without such information plaintiff was justified in continuing to deal with him as the ostensible agent of defendant, after he ceased to be in fact the duly authorized agent. Civ. Code, §§ 2317 and 2318.

[2] If circumstances ever justified the application of the rule "* * * that the acts of an agent after his authority has been revoked bind a principal as against third persons, who, in the absence of notice of the revocation of the agent's authority, rely upon its continued existence," those appearing in the instant case do. 21 R. C. L. 860; 2 Cor. Jur. 539. The above-quoted rule has been given support or applied in the following cases: Quinn v. Dresbach, 75 Cal. 159, 16 P. 762, 7 Am. St. Rep. 138; Swinnerton v. Argonaut L. & D. Co., 112 Cal. 375, 44 P. 719; Eddy v. American Amusement Co., 21 Cal. App. 487, 132 P. 83; Donnelly v. S. F. Bridge Co., 117 Cal. 417, 49 P. 559.

While it must be conceded that the court's finding as to Roberts' agency is not entirely accurate under the rules pertaining to findings of fact, the discrepancy is as to form rather than substance. Had the court found that at the outset of the transaction Roberts was the authorized agent of defendant, but during the latter part of the negotiations and at the time of the culmination of the deal he was the ostensible agent of defendant, this would have been more strictly in accordance with the evidence, but the conclusion of law that defendant was liable for the fraud of Roberts would have been the same. Ostensible authority furnished as secure a basis for plaintiff's recovery against defendant as actual authority.

Appellant urges that in other respects the findings are inconsistent and contradictory. Also that the court failed to find upon certain material issues. While, as already indicated, the findings are far from model in form, and it may be conceded they contain seeming inconsistencies, we have concluded that these defects are not such as warrant a reversal of the judgment.

[3] Appellant next urges that the court erred in allowing interest on the damages awarded from the date of the exchange. In support of this point it is contended that, inasmuch as defendant Meline Company had no knowledge of the particular transaction out of which the fraud and deceit arose and did not receive any of the benefits, interest on the award of damages is unwarranted. The only case cited by appellant in support of this contention is Lightner Mining Co. v. Lane, 161 Cal. 689, 120 P. 771, Ann. Cas. 1913C, 1093, from which is quoted a paragraph that contains language which supports appellant's position. The quoted language was used, however, in connection with a judgment declared by the court to be foundationed upon the conversion of chattels, wherein our Civil Code provides the rule of damages. Neither the case cited nor the language quoted has any application to a set of facts such as are here involved. Section 3288 of the Civil Code reads as follows: "In an action, for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury." Inasmuch as the action before us is one "not arising from contract" and is one based on fraud, it would clearly appear that it comes within the above-quoted section. The evidence and the findings of fact by the court, sitting as a jury, justify the exercise by the court of its discretion in allowing interest on the judgment.

[4] Appellant also urges that the court erred in including in its judgment the items of $1,119, the amount paid by plaintiff on the note given by her for commission; $90 escrow fee; and $10 for title search. We think appellant's contention as to these three items is well taken. Under section 3333 of the Civil Code which provides the measure of damages for the breach of an obligation not arising from contract, the measure of plaintiff's damage was the value of what she gave for the worthless note and trust deed. The value of

her equity in the property she traded was, according to her own testimony, $13,500. Had she received this amount with the interest on the Spears' note, she would have had no cause of action for the commission and other items she paid. Having been made whole, as it were, on her deal by the judgment for the value of her equity and interest thereon, this would seem to be the full amount of the detriment suffered by her, because the Spears' note and trust deed was not what Roberts represented it to be.

We do not discuss other points raised in the briefs, as we feel they do not affect the conclusions at which we have arrived.

The judgment will be modified by deducting therefrom the sum of $1,219, being the total of the three items hereinabove referred to, and, as so modified, the judgment is affirmed. The appeal from the order is dismissed.

We concur: CONREY, P. J.; YORK, J.

* * *

2 Cal.App.2d 547

HAUG et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 9762, 9835.

District Court of Appeal, Second District, Division 2, California.

Dec. 3, 1934.

Hearing Denied by Supreme Court Jan. 31, 1935.

1. Judgment ⇨301

In action to have deed absolute in form declared conveyance in trust, order, contained in judgment holding apparent deed to be mortgage, directing execution and exchange of appropriate deed, notes, and mortgages, was "interlocutory order," so that court, upon failure of plaintiff to comply with order, could dismiss case, or retain jurisdiction, and order sale of property and payment of defendant's claim with balance to plaintiff, who would not be liable for any deficiency.

[Ed. Note.—For other definitions of "Interlocutory Order," see Words & Phrases.]

2. Judgment ⇨326

In action to have deed absolute in form declared conveyance in trust, judgment declaring apparent deed a mortgage and ordering execution and exchange of appropriate deed, notes, and mortgages, but failing to provide for retention of jurisdiction and alternative action, in event of failure to comply with order, *held* correctible by nunc pro tunc order, so as to express true intention of court.

3. Mortgages ⇨608½

In action to have deed absolute in form declared conveyance in trust, where court had adjudged apparent deed a mortgage, and, on failure of plaintiff to comply with order directing execution of appropriate notes and mortgages to defendant, had ordered sale of property as on foreclosure, plaintiffs *held* not entitled to an equity of redemption.

Certiorari proceeding by Barbara Haug and another against the Superior Court of the State of California in and for the County of Los Angeles and others, for review of a nunc pro tunc order amending a judgment for defendant, in an action entitled Haug v. Carrie A. Fairbanks; and a prohibition proceeding to preclude lower court from signing an order pursuant to the amended judgment.

Nunc pro tunc order affirmed, and alternative writ of prohibition discharged, and peremptory writ denied.

E. Neal Ames, of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, S. V. O. Prichard, Deputy Co. Counsel, and Roy A. Linn, all of Los Angeles, for respondents.

SCOTT, Justice pro tem.

Petitioners herein brought an action entitled Haug v. Carrie A. Fairbanks (L. A. Co. 342853) asking that a deed by them to said defendant, which was absolute in form, be declared by the trial court to be a conveyance transferring title to the property therein described to defendant in trust for plaintiffs. Defendant answered praying that the deed be held absolute and for general relief. Judgment for defendant was rendered, in terms hereinafter discussed, decreeing the deed to be a mortgage. The trial court later made an order nunc pro tunc to amend the judgment as originally signed. This proceeding in certiorari is to review the said nunc pro tunc order. After the said order and pursuant to the amended judgment, the court ordered a sale of the property as upon a mortgage foreclosure, and the prohibition proceedings herein were instituted to keep the court from carrying into effect its purpose of having the property thus sold.

At the conclusion of the trial the court found that said defendant had loaned certain money to plaintiffs and the latter had given defendant a deed to the property. In its judgment the court required defendant to execute a deed conveying the property to plaintiffs and ordered the latter to execute notes to defendant for the amount of the latter's loan to them and to execute mortgages on the said property to defendant to secure the same. In the judgment as originally signed, no alternative action was decreed by the court in the event either party failed or refused to execute and deliver the instruments as required. No motion for new trial was made, and no appeal was taken from that judgment as originally signed and entered.

About a year after entry of the judgment as originally signed, the trial court made the said order, nunc pro tunc, "for amendment to judgment," which recited: "It appearing to the court that the judgment heretofore entered by the clerk in the above action is not a correct memorial of the judgment and order rendered and announced by this court herein," and then set out certain portions wherein said judgment originally entered was incomplete. Among the deficiencies therein which were thereupon supplied were the following words: "That the court retain jurisdiction of the matter and the parties until its orders have been carried out or until further order of this court." Thereafter, upon a hearing at which both parties were represented, a minute order was made and entered as follows: "Defendant's motion to adjudge plaintiffs guilty of contempt for their refusal to carry out the terms of the judgment heretofore entered is denied. Motion of defendant for the court to compel plaintiffs to execute the notes and mortgages is denied. Motion of the defendant that the property described in judgment be ordered sold to reimburse defendant for moneys heretofore loaned, advanced and expended for plaintiffs is granted." The writ of prohibition here considered seeks to preclude the lower court from signing the written order for sale conforming to such minute order just quoted.

[1] The case is one in which both parties have applied to a court of equity, not alone for the remedy to which each conceived himself to be entitled, but for an ascertainment and declaration of their respective rights, as indicated by the prayer for general relief in both complaint and answer. The trial court found the apparent deed to be in truth a mortgage, and found the rights of plaintiffs to title to the property to be subject to defendant's rights as creditor to have her money or her security therefor in the land. The order for the defendant to execute her deed and for plaintiffs to execute notes and mortgages for the amounts due defendant, and for the appropriate exchange and delivery of these documents, was in import and effect merely an interlocutory order. It gave the parties an opportunity to do that which equity deemed fair and just, and following that interlocutory judgment there was no motion for new trial or appeal.

The intention of the trial court to retain jurisdiction of the parties and the subject-matter is as evident from a reading of the judgment as at first entered as it was when that specific language was later added nunc pro tunc. Upon failure of plaintiffs to execute and deliver the notes and mortgages as provided by the court, their right to the benefit of the interlocutory order was ended, and the trial court would have been at liberty to dismiss the case. Cowing v. Rogers, 34 Cal. 648. Such action was not the only course which the court could pursue. In doing complete equity between the parties it could make such other or further order as would make effectual its original determination, provided it did not do more than divest plaintiffs of the equitable title which they sought to have declared and which by their failure to comply with the court's order they lost. The court would be well within its jurisdiction in ordering (1) sale of the property on behalf of defendant, (2) the payment to defendant of so much of the proceeds as might be necessary to satisfy her claim as theretofore determined by the court, and (3) the payment to plaintiffs of any balance of the sale price as remained over after the satisfaction of defendant's account. If there were no such balance there would in any event be no deficiency award to defendant against plaintiffs in this action, under the record as it has been presented to us.

[2-3] It is apparent that the nunc pro tunc order correcting the judgment was proper under the rule announced in Kowalsky v. Nicholson, 23 Cal. App. 160, 137 P. 607. Such an amendment served to correctly express the true intention and order of the court as originally made. It did not enlarge the rights or burdens of either party. Under the authority of Cowing v. Rogers, supra, and Bloom v. Bloom, 207 Cal. 70, 276 P. 568, it is apparent that the determination by the trial court of the case in question is proper and within its jurisdiction. It would appear that plaintiffs are not entitled under the authorities just cited to an equity of redemption, and that the omission of such a provision from the propos-

ed order of sale would not divest them of any right which they now have or to which they are entitled.

In civil No. 9835 the order is affirmed. In civil No. 9762 the alternative writ is discharged and a peremptory writ denied.

We concur: STEPHENS, P. J.; CRAIL, J.

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1 Cal.App.2d 545

SAMUELS v. SINGER et al.

Civ. 8781.

District Court of Appeal, Second District, Division 2, California.

Nov. 20, 1934.

Hearing Denied by Supreme Court Dec. 20, 1934.

On rehearing.

For former opinion, see 36 P.(2d) 1098.

PER CURIAM.

The concluding paragraph of the opinion heretofore filed herein is amended to read as follows:

It is ordered that the judgment be modified by deducting and striking therefrom the allowance and item of $37.72 interest, and that as so modified it be affirmed, each party to bear his costs on appeal.

Petition for rehearing denied.

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2 Cal.App.2d 304

DEL CARLO v. OBERTI.

Civ. 9283.

District Court of Appeal, First District, Division 1, California.

Nov. 20, 1934.

1. Damages 🔑132(1)

$4,000 to seven year old girl for fractured collar bone, with resultant permanent deformity, abdominal injury, enlargement of liver, ensuing tenderness and muscle rigidity, and vomiting attacks *held* not excessive.

2. Trial 🔑244(4)

In automobile accident case, instruction that defendant "in this case" was in charge of instrumentality capable of inflicting death was not erroneous where, in view of evidence, jury could not have been misled and words "in this case" could not be construed as singling out particular defendant and his automobile.

3. Appeal and error 🔑1064(1)

Instruction that automobiles shall be equipped with horns in good working order, while not proper in absence of issue of presence or absence of horn, *held* not reversible error where evidence of negligence was plain and jury was not instructed that violation of act constituted negligence as matter of law (St. 1931, p. 2116, § 95 (a).

4. Appeal and error 🔑1046(5)

Trial court's remark that transcript of certain disputed testimony did not state certain fact, while improper, was not reversible error where transcript disclosed that court was merely endeavoring to have disputed testimony accurately put before jury.

◆

Appeal from Superior Court, San Francisco County; Edmund P. Mogan, Judge.

Action by Eva Del Carlo, a minor, by Amalia Del Carlo, her guardian ad litem, against Giovanni Oberti. Judgment for the plaintiff, and the defendant appeals.

Affirmed.

Cooley, Crowley & Supple, of San Francisco, for appellant.

J. Francis Shirley, of San Francisco, for respondent.

McNUTT, Justice pro tem.

In the daytime, in a residential section, while several children, among them plaintiff, a girl aged seven years, were playing near defendant's driveway next to her home, defendant backed his Ford car out of his garage, stopped same with front wheels on the sidewalk, alighted, and closed the garage doors. He got into the car and drove same a short distance, with the left front wheel on the sidewalk, until it struck and ran over the plaintiff who was playing on the sidewalk near the curb. A witness saw the left rear wheel pass over her body and when he picked her up she was out of breath, could not speak or stand, and was holding her side and stomach, gasping for breath and frothing at the mouth.

Defendant, called under section 2055, Code of Civil Procedure, testified that he backed his car out of the garage without sounding a horn, having looked to his rear without seeing the child or children, and "hit a little girl" off the sidewalk and in the street.

[1] Medical testimony of plaintiff—defendant offered none—established a fractured collar bone with one-quarter inch displacement and some permanent deformity; some damage in the abdominal cavity, and an enlarged liver resulting probably from the accident. The child was in a cast in the hospital for a month. She had then and thereafter tenderness and muscle rigidity in the abdomen and region of the large bowel, attacks of vomiting and stomach tenderness and complained of pains. One of the three medical witnesses for plaintiff was an abdominal specialist under whose care she was at the time of the trial. The verdict of $4,000 was based upon sufficient evidence and the award, not attacked as excessive, is not so as matter of law.

[2] The specific assignments of error are that the court erred in its instructions, and that the trial judge was guilty of misconduct in commenting upon or stating the effect of certain evidence.

The first instruction complained of follows: "The defendant driver of the automobile involved in this case was in charge of a dangerous instrumentality, capable of inflicting serious injuries and death, and for that reason he was charged by law with a duty to operate said automobile in a careful and prudent manner."

In the pedestrian case of Raymond v. Hill, 168 Cal. 473, 143 P. 743, the court said that an automobile had power to inflict injury or death and referred to it as a terrifying machine.

In the following cases the automobile is said to be a dangerous instrumentality in that it has power to inflict serious injury and death: Weihe v. Rathjen Merc. Co., 34 Cal. App. 302, 167 P. 287; Vedder v. Bireley, 92 Cal. App. 52, 267 P. 724; De Greek v. Freeman, 108 Cal. App. 645, 291 P. 854; McCormac v. Chancy, 119 Cal. App. 470, 6 P.(2d) 978; Anderson v. Walters, 135 Cal. App. 380, 27 P.(2d) 100.

Appellant cites authority to the point that an automobile or motor vehicle is not in itself a dangerous machine or instrumentality, and that it cannot be placed in the same category as ferocious animals, locomotives, gunpowder, dynamite and similar dangerous machines and agencies (42 C. J. 614, 615) and refers to Buelke v. Levenstadt, 190 Cal. 684–688, 214 P. 42, 43, as follows: "While an automobile is not, in and of itself, a dangerous machine, it may become such in the hands of a careless and indiscreet person."

An automobile intrinsically or statically is not only not a dangerous instrumentality, but for that matter is not an instrumentality at all. However, in locomotion, it is a dangerous instrumentality when not driven in a careful and prudent manner. In view of the evidence this instruction cannot be said to have confused or misled the jury merely because the instruction referred to the automobile "in this case." On the oral argument appellant took the position that the instruction singled out this particular defendant and his automobile. That contention, however, does not seem meritorious.

[3] An instruction (section 95 [a] of the Motor Vehicle Act, St. 1923, p. 545, as amended by St. 1931, p. 2116), that every motor vehicle when operated on a highway shall be equipped with a horn in good working order capable of emitting sound audible under normal conditions from a distance of not less than 200 feet, should not have been given because the presence or absence of a horn was not in issue, but it is not reversible error because the evidence of negligence was so plain that no miscarriage of justice resulted therefrom; furthermore, the jury was not instructed that a violation of the act constituted negligence as matter of law.

[4] The contention that the trial judge was guilty of misconduct and that he commented on evidence to the detriment of the appellant-defendant is not well grounded. A plaintiff medical witness was under cross-examination when counsel for defendant put a question (page 161 of the transcript), to which counsel for plaintiff objected upon the ground that it assumed facts not in evidence.

"The Court: Is that in evidence?

"Mr. Shirley: (For plaintiff) I do not believe it is.

"Mr. Supple: Well, I will leave it to the jury on that.

"The Court: Well, you cannot do that.

"Mr. Supple: I simply stated it is in evidence within forty-eight hours Dr. Waller said—

"The Court: You have said that in your question, but counsel says it is not in evidence. You maintain that it is.

"Mr. Supple: I will put it this way: Q. Doctor, suppose—

"The Court: If there is any dispute about evidence, we cannot leave it to the jury. Just address the court, and the court will have the record examined. The jury cannot remember any more than the judge or the counsel, possibly. But the record speaks for itself. Therefore, don't refer things to the jury. Just address the court.

"Mr. Supple: All right, Your Honor. May I read—

"The Court: From your record?

"Mr. Supple: No, I am reading from the official testimony given by Dr. Waller on page 3 of Dr. Waller's testimony.

"The Court: Was the testimony transcribed?

"Mr. Supple: By Mr. Purrington, the official reporter.

"The Court: Well, I was never notified of that fact, I didn't know it was transcribed. I should have been notified about it.

"Mr. Supple: Yes, Your Honor.

"The Court: Well, I didn't know it. The reporter failed to notify me about it. It is the first I have heard of it. If you have it transcribed, point to it, or let me see it without reading it to the jury.

"Mr. Supple: Certainly, Your Honor."

The court then read from the examination of the doctor (pages 162 and 163 of the transcript):

"Mr. Shirley: Of course, it doesn't say it went down in 48 hours. But if Mr. Supple wants that question, I will withdraw the objection.

"The Court: Well, it doesn't say it went down within 48 hours, either."

This observation of the court is assigned as misconduct. Inasmuch as the testimony was read, it cannot be said that the court was wittingly guilty of misconduct or of commenting upon the weight or effect of evidence.

"Mr. Supple: I will stand on the record, Your Honor, if I may. Q. Well, Doctor, suppose the abdominal condition cleared up in 48 hours."

Mr. Shirley objected on the ground that many other elements were omitted.

"The Court: Well, have you withdrawn this other question?

"Mr. Supple: I am putting the last one to him, Your Honor.

"The Court: Read it. (Question read.)

"The Court: Well, I think that is a proper question on cross-examination. On redirect you can ask him about other conditions. Supposing it cleared up in 48 hours. There is some reference in that transcript to the fact that after the colon flushing the swelling of the abdomen subsided, isn't that it?

"Mr. Supple: Yes, Your Honor.

"The Court: You will have to base your question upon that testimony.

"Mr. Supple: Q. Would that fact have any influence in your professional opinion, Doctor, that this condition which you say is the enlargement of the liver was caused by an injury?

"The Court: Well, I don't understand that question. You had better withdraw it and put your question again."

Plaintiff's counsel objected on the ground that there was no evidence that it cleared up in forty-eight hours.

"The Court: The evidence is, according to the transcript, that the abdominal swelling subsided after a flushing of the colon. It doesn't say whether 24 hours or 56 hours, but it says it subsided.

"Mr. Shirley: I am willing to stand on the record with Mr. Supple.

"The Court: Well, that is the record.

"Mr. Shirley: And it doesn't say that in this record that he has.

"Mr. Supple: I will withdraw all my questions and I ask for leave to read the testimony to the jury when I argue my case."

Mr. Shirley stated that he had no objection to its being read at the moment.

"Mr. Supple: Well, Your Honor, may I conduct my own cross-examination without interruption by counsel?

"The Court: Well, any other questions of this doctor?"

Whereupon Mr. Supple questioned the doctor along other lines and said: "That is all." (Page 166 of the transcript.)

No exception was taken to the court's remarks, but the question of whether an exception was necessary need not be discussed for the reason that the transcript discloses that the trial judge was endeavoring to have the testimony in dispute accurately put before the jury, and while the remark "it does not say that either" might well have been omitted, in the light of the context it was harmless. Appellant's criticism that the judge's remark that he had not been informed that the testimony had been transcribed and that he should have been notified was taken by the jury as a reflection upon counsel to the disadvantage of his client is a forced interpretation of language. He said in effect that had he been told in the first place that there was a transcript there would have been no occasion to speculate as to what it contained.

The finding that the defendant's negligence was the approximate cause of the plaintiff's injury is amply supported by evidence, the verdict is not excessive, and there is no reversible error in the colloquy between and among counsel and the court.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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2 Cal.App.2d 238

PEOPLE v. WALLACE.

Cr. 2549.

District Court of Appeal, Second District, Division 1, California.

Nov. 15, 1934.

1. Homicide ⟹146

Element of malice aforethought in murder in second degree may be implied when circumstances attending the killing show an abandoned and malignant heart (Pen. Code, §§ 187, 188).

2. Automobiles ⟹357

Instruction that one who, while driving automobile under influence of intoxicating liquor, causes death of another, is guilty of murder in second degree, *held* prejudicially erroneous, where evidence also authorized verdict of manslaughter (St. 1929, p. 537, § 112; Pen. Code, §§ 187, 188, 192).

3. Criminal law ⟹829(4)

Refusal of specific instruction to acquit defendant of failure to stop his automobile and give aid to injured person if he was ignorant of fact that automobile had struck another person *held* error, though instruction was covered in substance by given instruction (St. 1929, p. 544, § 141).

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Clifford F. Wallace was convicted of murder in the second degree, of driving an automobile while under the influence of intoxicating liquor, and of failure to stop his automobile and give aid to the injured person, and, from the judgment of conviction, and from an order denying his motion for a new trial, he appeals.

Judgment and order reversed.

Ben W. McLendon and Jarrett Beckett, both of Long Beach, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

PER CURIAM.

Defendant appeals from a judgment of conviction that was rendered against him pursuant to three several verdicts returned by a jury for the commission by him of the respective crimes of murder in the second degree, violation of section 112 of the California Vehicle Act (St. 1923, p. 553, as amended by St. 1929, p. 537), relating to the driving of an automobile while the driver thereof is under the influence of intoxicating liquor, and violation of section 141 of the same act (St. 1923, p. 562, as amended by St. 1929, p. 544), which in part relates to the failure of the driver of an automobile that has been involved in an accident caused by the collision of such automobile with an individual to stop his automobile and give aid, etc., to any person injured in such accident. Defendant also appeals from an order by which his motion for a new trial was denied.

It is contended by respondent that, as is indicated by the judgment from which the appeal is taken, the defendant while in an intoxicated condition drove and operated an automobile in such manner that it collided with one Guy Kennon, from the effects of which collision Kennon immediately died, and that after the happening of such accident defendant did not stop his automobile and render aid to said Kennon, etc.

Appellant questions the legality of each of the three verdicts returned by the jury against him, and especially attacks the judgment because of the asserted insufficiency of the evidence to support each of such verdicts.

[1] Although by statutory provision, in order to constitute the crime of murder in the second degree, "malice aforethought" must be present in the mind of the killer of a human being (section 187, Pen. Code), the existence of such a condition may be implied "when the circumstances attending the killing show an abandoned and malignant heart" (section 188, Pen. Code). And it has been held that, where the killing has arisen from, or in the course of, the commission by the accused of a

criminal offense amounting to a felony (even other than those felonies specified in section 189 of the Penal Code which relate more particularly to the crime of murder in the first degree), a verdict of murder in the second degree may be sustained. People v. McIntyre, 213 Cal. 50, 1 P.(2d) 443; People v. Hubbard, 64 Cal. App. 27, 220 P. 315; People v. Collins, 195 Cal. 325, 233 P. 97; 13 Cal. Jur. 603.

By the terms of section 17 of the Penal Code, it is provided that "a felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison."

After denouncing the act of driving an automobile on any public highway within the state by one "who is under the influence of intoxicating liquor," section 112 of the California Vehicle Act provides for the punishment that may be imposed upon one who has been convicted of a violation of such statute, and which punishment, dependent entirely upon the "recommendation" to be made by the jury, may be either a fine, an imprisonment in a county jail, or an imprisonment in the state prison. In the instant case, the jury returned its verdict by which defendant was found guilty of "violation of section 112, California Vehicle Act"; and recommended as punishment "one year in state prison." It would therefore appear that, by reason of the determination by the jury, in effect that at the time when the accident occurred which resulted in the death of Guy Kennon defendant was engaged in the commission of a felony, a sufficient foundation in law was created which would authorize a contemporaneous verdict against defendant of murder in the second degree. But with reference to the alleged violation by defendant of the provisions of section 112 of the California Vehicle Act, which relate to the accusation that at a time when he was under the influence of intoxicating liquor defendant drove an automobile on a public highway of this state, as a separate and controlling subject for consideration by this court, appellant challenges the sufficiency of the evidence adduced on the trial of the action to warrant the verdict of his guilt thereof.

Even though we might concede that in point of law the evidence is sufficient to support a finding that the defendant is guilty of the several offenses (and as to this we express no opinion), yet such evidence is not so clear and undisputed that we may ignore those errors committed by the court in relation to instructions to the jury—which errors we shall now discuss.

[2] At the conclusion of the trial, the jury was instructed by the court that: "You are instructed that any person, who, while driving an automobile under the influence of intoxicating liquor, as defined to you in these instructions, causes the death of any other person, is guilty of the crime of murder of the second degree."

Although other instructions were also given to the jury by which a verdict of manslaughter was authorized, such instructions were predicated, not upon the presumed fact that "while under the influence of intoxicating liquor" defendant had operated an automobile "on a public highway of this state," but were based entirely upon a part of the statutory definition of manslaughter included within section 192 of the Penal Code; that is to say, the unlawful killing of a human being without malice, and without due care and circumspection. That such a distinction clearly exists is pointed out in the case of People v. McGrath, 94 Cal. App. 520, 525, 271 P. 549, 551, where it is said: "On the other hand, evidence of indulgence in intoxicating liquor is wholly unessential to the establishment of the crime of reckless driving, as it is defined by section 121 of said act; that is, a person may be guilty of driving without due caution and circumspection, or in such manner as to endanger the safety of others, even though he has not indulged at all in intoxicating liquors. The two crimes are therefore not only distinct in law but in fact, for each crime pertains to a separate state of facts." But no evidence whatsoever was introduced by the prosecution that would authorize the giving of such an instruction on the assumption that at the time when the accident occurred defendant was not operating his automobile with due care and circumspection. In that regard, the only evidence presented was that offered in behalf of defendant, and which was entirely to the contrary of such theory. A consideration of the terms of the instruction quoted herein will at once disclose the situation that the jury was thereby told that, if it found that, while under the influence of intoxicating liquor, defendant had driven his automobile on a public highway of this state, and thus had caused the death of Guy Kennon, there could be but one verdict, "murder of the second degree." Leaving out of consideration the fact that no evidence was presented as to the exact manner in which Guy Kennon met his death, that is to say, in general, whether his death was the result either of his own voluntary or his own involuntary act, or conduct, or specifically, whether on his part his death was accidental, or by design, or whether on the part of defendant the accident was due to his negligence, from an examination of the case of People v. Collins, 195 Cal. 325, 349, 233 P. 97, it becomes manifest that in a situation such as is presented herein a jury is authorized to return a verdict of "guilty of the crime of manslaughter," and consequently that in the instant case the instruction to the jury by which it was limited in its verdict either to an acquittal of defendant, or to a finding of "guilty of the crime of murder of the second degree," was prejudicially erroneous.

[3] As to the third count of the information upon which defendant was convicted, and from the ensuing judgment whereon he has appealed to this court, to wit, that of failure to stop his automobile and give aid, etc., appellant complains of the refusal of the trial court, following defendant's request therefor, to give to the jury the following instruction: "The defendant is charged in count three of the information filed in this cause with violation of section 141 of the California Vehicle Act. I instruct you that the said vehicle act imposes a duty upon the driver of any vehicle involved in an accident which results in injury or death to any person to immediately stop, render reasonable assistance to any person injured and furnish to the person struck certain information required by law. However, I further instruct you that this does not apply to a person who was ignorant of the fact, that the automobile he was driving had struck another person, and if you believe from the evidence in this case that the defendant's auto collided with the deceased and that the defendant was unaware of such fact, he would not be guilty of a violation of the law and it is your duty to acquit him of said charge."

That in circumstances such as were present in the instant case an instruction to the effect of that herein quoted is proper, and on request of the defendant in the action should be given to the jury, is attested by the decisions in the cases of People v. Scofield, 203 Cal. 703, 711, 265 P. 914; People v. Graves, 74 Cal. App. 415, 240 P. 1019. See, also, People v. Leutholtz, 102 Cal. App. 493, 283 P. 292. Respondent concedes as much, even though, as respondent contends, "the instruction was covered in substance" by another instruction that was given to the jury.

The impressive point of the refused instruction was that, if defendant was "ignorant of the fact that the automobile he was driving had struck another person," a verdict of guilty could not lawfully be rendered against him. Although it may be that by the instruction which was given to the jury it was informed in a general or roundabout way that, before defendant could be convicted of the offense, the evidence must show beyond a reasonable doubt that at the time the accident occurred he must have been aware of that fact, since his positive knowledge thereof is an essential element of the offense, we think that defendant was entitled to have given to the jury a specific instruction on the point such as was requested by him. But, even though the jury had been adequately instructed in that regard, an examination of the record herein fails to show that defendant necessarily should be held to have had the required knowledge of the fact that his automobile had struck any person, or had been "involved in an accident." To the contrary, the evidence leans heavily to the opposite conclusion.

While we have not found any error in the rulings of the court in relation to the prosecution on the second count, we are of the opinion that the evidence thereon is so connected and commingled with the evidence relating to the charge of murder that the granting of a new trial on the first and third counts necessarily carries with it the right to a retrial of the entire case.

It therefore should follow that, as to each of the counts on which defendant was convicted, the judgment rendered against him should be reversed; furthermore, that the order by which defendant was denied a new trial should be reversed. It is so ordered.

2 Cal.App.2d 274

PEOPLE v. GAMA.

Cr. 2603.

District Court of Appeal, Second District, Division 1, California.

Nov. 16, 1934.

Hearing Denied by Supreme Court Dec. 13, 1934.

1. Criminal law 🔑507(7)

Fifteen year old girl was not accomplice of man charged with offense against her, and corroboration of her testimony as to relationship between them was unnecessary to sustain conviction.

2. Criminal law 🔑1169(3)

Admission of testimony of victim of offense charged that defendant was her father's brother *held* not error warranting reversal of conviction, where defendant admitted such fact to arresting officer and witness was not cross-examined as to basis of her statement.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Manuel Gama was convicted of an offense, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

YORK, Justice.

Appellant was charged by information filed by the district attorney of Los Angeles county; the information containing two counts, covering separate offenses. Jury trial having been waived, the matter was by stipulation submitted on the transcript of the preliminary hearing and certain additional evidence that was taken by the court; whereupon the court found appellant guilty as to count 2 and dismissed count 1 of the information. Motion for new trial was made and denied, and judgment and sentence as to count 2 was made and entered. This appeal is from the judgment and from the order denying motion for new trial.

Appellant claims the evidence is insufficient to support the judgment finding him guilty as charged in count 2 for two reasons: First, that the proof of relationship between the defendant and his victim was made only by the victim, who is designated by appellant as an accomplice whose evidence is uncorroborated; second, that the evidence introduced as to the relationship was solely a conclusion or hearsay.

[1, 2] The victim being a child of the age of fifteen years, there is nothing whatever to the point as to her being an accomplice. As to her testimony that the defendant was her uncle and that he was a brother of her father, there is in addition an admission of the defendant made to the arresting officer that he was a brother of the victim's father. Appellant's contention that the victim was an accomplice is answered by the case of People v. Stoll, 84 Cal. App. 99, 257 P. 583.

Not a single question was asked of the victim upon cross-examination to ascertain the basis of her statement that appellant was her uncle. As stated in respondent's brief: "Such relationship was apparently and most obviously conceded throughout the trial, as appellant did not deny such relationship nor in fact was he questioned by his own counsel regarding it. In fact he expressly admitted it to exist."

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

PEOPLE v. HENDERSON. *

Cr. 2554.

District Court of Appeal, Second District, Division 1, California.

Nov. 14, 1934.

Hearing Granted by Supreme Court Dec. 13, 1934.

1. Infants 🔑20

Minor's credible testimony, corroborated in many material parts, *held* sufficient to sustain conviction on conflicting testimony for contributing to minor's delinquency by giving her intoxicating liquor.

2. Criminal law 🔑726, 728(2)

Deputy district attorney's statements, made without objection during closing argument in response to argument of defendant's counsel, that she had no right to give jury her opinion as to defendant's motive for committing crime and that such motive was not problem in case, *held* not improper.

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*For subsequent opinion see 48 P.2d 17.

3. Criminal law 🔑859

Reporter's failure to read to jury defendant's testimony, in trial for contributing to minor's delinquency by giving her intoxicating liquor, as to when she left defendant's store in response to jury's request for information concerning testimony as to time of her departure therefrom and arrival at her home, *held* not prejudicial error, where reporter read defendant's testimony as to how long minor was in store and defendant's attorney indicated his satisfaction before jury again retired to deliberate.

4. Criminal law 🔑1023(3)

Order denying defendant's motion before sentence was pronounced to dismiss prosecution was not appealable (Pen. Code, § 1237).

◆

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

George Henderson was convicted of contributing to a minor's delinquency by giving her intoxicating liquor. From a judgment and order denying his motion for a new trial and an order denying his motion to dismiss, he appeals.

Judgment and order denying motion for new trial affirmed, and appeal from order denying motion to dismiss dismissed.

Willis O. Tyler, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

ELLIOT CRAIG, Justice pro tem.

Defendant was convicted by jury verdict of contributing to the delinquency of a minor by giving her intoxicating liquor. Motion for a new trial was made and denied.

[1] Appellant states his points on appeal as follows, to wit: (1) "Whether there is sufficient credible evidence to sustain the verdict," and (2) "whether there was not misconduct at the trial at the proceedings had when the jury returned from deliberating and sought the reading of further testimony."

Appellant concedes the law to be that: "This court will not reverse a judgment given upon a verdict unless there is no evidence to support it, or when the evidence relied upon to uphold it is so inconsistent or improbable as to be incredible, or when it so clearly and unquestionably preponderates against the verdict as to convince the court that it was the result of passion or prejudice on the part of the jury." People v. Niino, 183 Cal. 126, 190 P. 626.

No good purpose would be served by a recital of the testimony. It will suffice to say that there was a conflict in the testimony, that the testimony of the minor is corroborated in many material parts, and that, although the transcript of all the testimony has been read with care, we find nothing incredible in the testimony of the minor.

[2] Appellant, in his brief, complains of certain statements which he states were made by the deputy district attorney in her opening argument but which, in fact, were made in the closing argument and to which no objection was made at the time in the trial court. These statements are: "Ladies and gentlemen of the jury, if I have my own opinion as to what motive he had they wouldn't let me give it to you, and I haven't any right to give it to you even if he asked me," and, "And what that motive was, whether it was Christmas spirit, or whether it was a motive to see just how much liquor she could hold, ladies and gentlemen, is not a problem here." These statements apparently were responsive to argument by defendant's counsel and were prefaced by "Mr. Tyler also asked what motive would this defendant have to have given this girl intoxicating liquor." We see no error therein.

[3] Some time after its retirement to the jury room for deliberation upon its verdict, the jury returned into court and asked for certain information concerning some of the testimony. Portions of the testimony of several witnesses were read by the reporter. Immediately following said reading, the transcript discloses the following:

"The Court: Do you want anything else read? (No response.)

"The Court: Satisfactory to the defense?

"Defendant's attorney: Yes, your Honor.

"The Court: Are the people satisfied?

"Deputy District Attorney: Yes, your Honor. (Jury retires to deliberate on their verdict.)"

The reading of the reporter's notes was for testimony concerning the time of the minor's departure from defendant's store and the time of her arrival at her home. The reporter read the following from defendant's testimony: "Q. How long do you think she was in the store? A. I judge about 25 minutes." And the reporter then stated: "I find nothing else in his testimony regarding the time." The reporter overlooked a statement made by defendant as follows: "I figure that Miss ——— had left about 4:15, something like that * * *." Appellant contends that the failure to read this was prejudicial error. Taking consideration of all the evidence in the case, we do not consider this a prejudicial error.

[4] Oral notice of appeal was given from the order denying the motion to dismiss. Appellant's brief makes no reference to such order. The clerk's transcript shows a motion to dismiss made before sentence was pronounced and therefore the order thereon is not an appealable order. Section 1237, Pen. Code.

The judgment and order denying the motion for a new trial are affirmed, and the purported appeal from the order denying the motion to dismiss is dismissed.

We concur: HOUSER, Acting P. J.; YORK, J.

2 Cal.App.2d 384

REESE v. GROSS et al.

Civ. 1516.

District Court of Appeal, Fourth District, California.

Nov. 22, 1934.

1. Quieting title 🔑38

In action to quiet title to mining claims wherein it was alleged that defendant claimed interest in property adverse to plaintiff, answer which denied each and every allegation was disclaimer of any interest in property.

2. Pleading 🔑349

In action to quiet title to mining claims, answer which admitted allegation that defendant claimed interest adverse to plaintiff and which denied plaintiff's ownership raised material issues of fact, precluding entry of judgment on pleadings.

◆

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by H. A. Reese against Charles S. Gross and Helen Duvall. From the judgment, Charles S. Gross appeals.

Judgment against Charles S. Gross reversed.

W. T. Kendrick, Jr., of Los Angeles, for appellant.

Charles Bagg, of San Bernardino, for respondent.

MARKS, Justice.

[1] In June, 1928, plaintiff filed his action against defendants to quiet title to mining claims. The complaint is in the form usually found in such actions, and, among other things, alleges "that the defendants, and each of them, claim some interest in and to said property adverse to this plaintiff." The answer, filed in April, 1929, consisted solely of the following denial: "Deny each and every allegation as therein set forth." This is in effect a disclaimer of any interest in the property. Baar v. Smith, 201 Cal. 87, 255 P. 827.

In October, 1931, the plaintiff moved the trial court for judgment on the pleadings. After this motion was noticed, and before it was heard, defendant Gross noticed a motion for leave to file an amended answer. The two motions came on for hearing at the same time. The motion of Gross was granted and the amended answer was filed, and the motion for judgment on the pleadings was denied.

[2] The amended answer admitted that Gross claimed an interest in the property described in the complaint adverse to that of the plaintiff and denied the ownership of plaintiff. This amended answer raised issues of fact which could be decided only after trial and upon evidence taken. Butterfield v. Graves, 138 Cal. 155, 71 P. 510; Smart v. Peek, 213 Cal. 452, 2 P.(2d) 380; Warden v. Stoll, 210 Cal. 374, 291 P. 835; Hinds v. Clark, 173 Cal. 49, 159 P. 153.

Plaintiff then noticed motions to strike out the amended answer and for judgment on the pleadings. The trial court denied the motion to strike, and granted the motion for judgment on the pleadings.

As the amended answer raised material issues of fact and was not stricken from the record, it was error on the part of the trial court to enter judgment on the pleadings. In Cohn v. Klein, 209 Cal. 421, at page 424, 287 P. 459, 460, it was said: "A word should here be said respecting the propriety of a motion by plaintiffs for judgment on the pleadings. This is called for by reason of the general rule that in an action to quiet title a plaintiff must prevail upon the strength of his own title and not upon the weakness of the title of his adversary. Patchett v. Webber, 198 Cal. 440, 451, 245 P. 422, and other cases. In view of the general allegations of ownership by plaintiffs and the general denial thereof by defendants, it may be said that a motion by plaintiffs for judgment on the pleadings is improper, as such a motion is in the nature of a demurrer to the answer, and, where the answer raises a material issue, no such motion can be allowed to prevail. Cass v. Rochester, 174 Cal. 358, 163 P. 212; Neale v. Morrow, 174 Cal. 49, 161 P. 1165."

The judgment against appellant is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

GORE v. MARKET ST. RY. CO. et al.*

Civ. 8816.

District Court of Appeal, First District, Division 1, California.

Nov. 30, 1934.

As Amended Dec. 18, 1934.

Rehearing Denied Dec. 29, 1934.

1. Street railroads 🔑98(7)

That person struck by street car attempts to cross track when car is seen approaching does not of itself constitute contributory negligence, but if, in view of knowledge of custom to stop cars at particular place, distance from approaching car, rate of speed, and other circumstances, reasonably prudent person would have undertaken to cross, negligence may not be imputed.

2. Street railroads 🔑98(7)

Plaintiff struck by street car was justified in assuming car would be stopped in usual way, when she stepped onto track, where she frequently boarded car at that place and knew of practice of company.

3. Negligence 🔑83

Last clear chance doctrine applies as much where plaintiff is unaware of danger and for that reason unable to escape as where he is conscious of danger from which he cannot escape by ordinary care, and it applies notwithstanding continuing negligence of plaintiff under same circumstances.

4. Street railroads 🔑117(35)

Negligence of street railroad under last clear chance doctrine *held* for jury in action by pedestrian struck at intersection as she crossed track with intention of boarding car.

5. Trial 🔑257

Where issue of last clear chance was not disclosed by pleadings but developed by evidence in action against street railroad for injuries to pedestrian, offer of instruction during trial was not too late (Code Civ. Proc. § 607a).

6. Trial 🔑337

Where court expressly but erroneously withdraws issue on last clear chance from jury's consideration, they are not bound to follow such instruction and their verdict to contrary will not be disregarded.

7. Street railroads 🔑118(15)

Where there was sufficient evidence to support finding against street railway under last clear chance doctrine in pedestrian's personal injury action, offered instruction on such issue should have been given.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Nella Gore against the Market Street Railway Company and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

William M. Abbott, Walter H. Linforth, and William M. Cannon, all of San Francisco, for appellants.

Ford & Johnson and Fletcher A. Cutler, all of San Francisco, for respondent.

PER CURIAM.

An action to recover damages for personal injuries sustained by plaintiff, who was struck by a street car operated by defendants. She averred that her injuries were due to defendants' negligence. Defendants denied any negligence on their part, and alleged that the injuries were proximately caused by plaintiff's contributory negligence. The jury found for the plaintiff, and from the order denying the motion of defendants for judgment notwithstanding the verdict the defendants have appealed.

They claim that the evidence supports only the conclusion that they were using due care and that plaintiff was guilty of contributory negligence.

The accident occurred about 7:45 o'clock p. m. on August 24, 1929, at the intersection of Fulton street and Fifteenth avenue in San Francisco. There was a street light suspended from a trolley pole on the northwest corner of the intersection. The car was proceeding east along Fulton street at a speed

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*For subsequent opinion see 48 P.2d 2.

variously estimated at between 25 and 15 miles per hour. About 10 feet west of the intersection and immediately south of the company's double tracks along Fulton street was situated a safety station approximately 55 feet in length. The distance from the easterly curb line of Sixteenth avenue on the west to the west end of the safety station was about 215 feet, and Fulton street was 55 feet in width between the curbs. Plaintiff testified that when she arrived at the northeast corner of the intersection the car was about two blocks distant; that she crossed to the northwest corner, thence walked south across McAllister street with the intention of boarding the car at the safety station; and that the car was then about half a block away. As she started to cross, she held up her hand as a signal and kept it in that position. When she reached the track on which the car was proceeding, she was struck and knew no more. There was a conflict in the evidence as to the course pursued by plaintiff. One witness testified that she crossed the intersection diagonally from the northeast corner to the place where she was struck. The motorman claimed that although he was looking ahead constantly, he did not observe her until the car was about 15 feet from the point of collision, and that he immediately reversed the power and put on the brakes, but was unable to avoid the accident; further, that the car, going at the speed it was moving, was brought to a stop within 25 to 30 feet. There was some dispute as to the point of collision and the place where the car stopped. Plaintiff testified that it was not dark at the time and, according to the conductor, who was standing in the rear right-hand door of the car looking ahead from the time it passed Sixteenth avenue, he could at all times see the safety station, and that there was no one waiting there; further, that the car slackened speed as it approached the corner to about 10 or 15 miles per hour, and within 10 or 15 feet from the point where its speed was first slackened it was brought to a stop in the intersection. There was likewise a dispute as to whether the speed of the car was slackened before the power was reversed.

[1, 2] It is clear that the plaintiff upon giving the usual signal that she wished to board the car—and which she testified was continued up to the time she was struck—anticipated that the motorman would stop at the place provided for taking on passengers and where cars customarily stopped upon signal. If the motorman observed her and the signal—which facts the jury might reasonably infer from all the testimony—then as a reasonable man he must have known that she relied upon the custom of the company to stop at the safety station when apprised that persons wished to board its cars. The mere fact that a person attempts to cross a street railway track when a car is seen approaching does not of itself constitute contributory negligence [Flach v. Fikes, 204 Cal. 329, 267 P. 1079]; and if, in view of his knowledge of the custom of the company to stop its cars at the particular place, his distance from the approaching car, the rate of its speed and other circumstances, a reasonably prudent person would have undertaken to cross, negligence in so doing may not be imputed [Simoneau v. Pacific Elec. Ry. Co., 166 Cal. 264, 136 P. 544, 49 L. R. A. (N. S.) 737]. It has also been held that such circumstances may require the motorman to anticipate that persons will ignorantly place themselves in a position of danger; and a settled custom to stop at a particular place becomes a rule of practice upon which the public has a right to rely to a reasonable extent, and a departure therefrom is an element in determining the question of negligence. Ross v. Railways Co., 47 Cal. App. 753, 191 P. 703. Plaintiff had boarded the car at this point frequently and knew of the practice of the company; and we cannot say that she was not justified under all the circumstances in assuming that the car would be stopped in the usual way and did not realize the contrary until too late to save herself.

[3, 4] As urged by defendants, the facts of the present case resemble those in Anderson v. Market St. Ry. Co., 116 Cal. App. 282, 2 P. (2d) 529; and that decision might control were it not that in the present case there is evidence that defendants, notwithstanding the assumed negligence of the plaintiff, had the last clear chance to avoid injuring her. As stated, the evidence shows sufficiently that any person with normal eyesight, looking ahead as the motorman testified, could have seen plaintiff's approach and her signal to stop. It further shows that a stop was made in from 10 to 15 feet from the point where the speed was first slackened, and we are satisfied that the jury might fairly have concluded from the evidence that, contrary to the motorman's testimony, he did see that plaintiff, anticipating that the car would stop upon her signal at the usual place, was about to cross the track on which it was traveling [Hoy v. Tornich, 199 Cal. 545, 552, 250 P. 565; Darling v. Pacific Elec. Ry. Co., 197 Cal. 702, 711, 242 P. 703], and that seeing her, he should have realized her perilous position at a time when by the exercise of ordinary care he

might have avoided the accident [Chappel v. San Diego, etc., Ry. Co., 201 Cal. 560, 258 P. 73]. The doctrine of last clear chance applies as much to a case where the plaintiff is still unaware of the danger, and for that reason unable to escape, as to one where he is conscious of the danger from which he cannot escape by the exercise of ordinary care [Hoy v. Tornich, supra], and it applies notwithstanding the continuing negligence of the plaintiff under the same circumstances [Girdner v. Union Oil Co., 216 Cal. 197, 13 P.(2d) 915; Center v. Yellow Cab Co., 216 Cal. 205, 13 P.(2d) 918]. These questions were for the jury [Gilmore v. Los Angeles Ry. Corporation, 211 Cal. 192, 295 P. 41; Cunningham v. Los Angeles Ry. Co., 115 Cal. 561, 47 P. 452; Rasic v. Schultheiss, 121 Cal. App. 560, 9 P. (2d) 550], and we cannot say that their implied conclusions are unsupported.

Defendants contend, however, that the case was not tried on the theory that they had the last clear chance to avoid the injury and that the issue was not presented to the jury.

[5, 6] It might be inferred from the opening statement of counsel for plaintiff that such was not his theory of the case. Nevertheless he asked the court to instruct the jury that they might find on the issue. This instruction the court refused. What was said by counsel in their arguments to the jury the record does not show. Defendants urge that the proposed instruction was offered during the trial, and that under the provisions of section 607a of the Code of Civil Procedure, the offer came too late. This issue was not disclosed by the pleadings but developed by the evidence; consequently the offer was within the time limited by the section. It has been held that an issue is not waived by failure to ask for an instruction [Jones v. Goldtree Brothers Co., 142 Cal. 383, 388, 77 P. 939]; and had the court expressly but erroneously withdrawn the issue from the jury's consideration, they would not have been bound to follow such an instruction, and their verdict to the contrary would not be disregarded [O'Neill v. Thomas Day Co., 152 Cal. 361, 92 P. 856, 14 Ann. Cas. 970].

[7] As stated, we are of the opinion that there was sufficient evidence to support a finding that defendants had the last clear chance to avoid the accident by the exercise of ordinary care. It follows that the offered instruction should have been given. The question was within the issues as disclosed by the evidence, and defendants as well as the plaintiff would have been entitled to an instruction requiring the jury to find thereon. Stein v. United Railroads, 159 Cal. 368, 113 P. 663. Under the circumstances the plaintiff should not be prejudiced by the error. Jones v. Goldtree Brothers, Co., supra; see, also, Ruppel v. United Railroads, 10 Cal. App. 519, 101 P. 803.

The verdict was fairly supported, and the record discloses nothing which would justify a reversal. The order is affirmed.

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2 Cal.App.2d 270

PAYNE v. SANTA BARBARA COTTAGE HOSPITAL.

Civ. 8087.

District Court of Appeal, Second District,
Division 1, California.

Nov. 16, 1934.

Rehearing Denied Dec. 6, 1934.

Hearing Denied by Supreme Court
Jan. 14, 1935.

Hospitals 🔑7

Hospital *held* not liable for alleged negligence in furnishing "toothpick applicators" for use in bandaging patient's wounds, since alleged negligence was not proximate cause of toothpick and cotton finding their way into patient's body, in view of intervening factor of use of applicators by trained nurse employed by patient.

Appeal from Superior Court, Santa Barbara County; Pat R. Parker, Judge.

Action by Herbert A. Payne against the Santa Barbara Cottage Hospital. Judgment for plaintiff, and defendant appeals.

Reversed and remanded, with directions.

Heaney, Price & Postel, of Santa Barbara, and George L. Greer, of Los Angeles (Margaret Dunn Kamper, of Santa Barbara, of counsel), for appellant.

Hill, Morgan & Bledsoe, Vincent Morgan, and Stanley S. Burrill, all of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

This is an action for damages alleged to have been sustained by plaintiff while a patient in the hospital operated by the defendant.

Plaintiff went to the hospital for an abdominal operation, which was performed by his own physician. He was thereafter cared for by his physician and by nurses employed by him or his physician. Plaintiff remained in the hospital until the wound healed, when he returned to his home in Los Angeles.

Some time later plaintiff experienced great physical discomfort, and in the endeavor to find a cause for the difficulty the old incision was opened up and a toothpick taken out. Later some cotton was found in plaintiff's body, and plaintiff's charge of negligence is that the toothpick and cotton found their way into his body while in the defendant's hospital as a result of its negligence in furnishing what are commonly termed "toothpick applicators"; that is to say, toothpicks with cotton on each end, for use in bandaging his wound.

The verdict of the jury was in favor of plaintiff for $35,000. Thereafter defendant moved for a new trial, and the trial judge made an order purporting to grant the motion. But this order the Supreme Court held to be ineffectual because not filed within the time provided by section 660, Code of Civil Procedure. Payne v. Hunt, 214 Cal. 605, 7 P.(2d) 302. Therefore it must be held that, by operation of law, the motion was denied.

Both parties agree that, in a case such as this, where the hospital does not furnish the services of either physicians or nurses, its duty is to exercise ordinary care to furnish to the attendants of the patient suitable supplies, equipment, and facilities commensurate with the requirements of his case, and to use reasonable care in providing the same for the use of those charged with his care and treatment. All of the medical testimony was to the effect that the use of toothpick applicators with surgical dressings is a dangerous practice, and plaintiff's cause of action is based upon the alleged negligence of the hospital in furnishing toothpick applicators to or for him.

Defendant's principal contention in response to this charge is that there is no evidence upon which a finding that it furnished toothpick applicators can be based, and that, even had it done so, its action was not the proximate cause of the injuries complained of.

Plaintiff testified positively that "toothpick applicators were used by every nurse who had anything to do with my case". His wife said that she saw them on the trays brought from the dressing room of the hospital, in the patient's room, and in use by the nurses attending the plaintiff. On the contrary, the physicians who operated on and thereafter cared for plaintiff, and the nurses employed by plaintiff, each testified positively that no such applicators were either furnished by the hospital or used by them. Also, employees of the hospital, who had duties in connection with its supply room on the floor where plaintiff's room was situated, denied that toothpick applicators were furnished. But the defendant asserts that, even if it furnished the toothpick applicators, its act in so doing was not the proximate cause of plaintiff's injuries, because the chain of causation was broken by the intervention of an independent responsible agency.

In the case of Merrill v. L. A. Gas & Elec. Co., 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134, which is one of the cases most often cited on the subject of proximate cause, Justice Henshaw pointed out that "an independent wrongful act, to constitute the proximate cause * * * by displacing the original primary cause, must be so disconnected in time and nature as to make it plain that the damage occasioned was in no way a natural or probable consequence of the original wrongful act or omission."

Under the evidence in this case, can it be said that the injury which plaintiff suffered was a natural or probable consequence of the act of the hospital in furnishing the toothpick applicators? "The law will not look back from the injurious consequences beyond the last efficient cause, where a responsible and intelligent person has intervened, if the chain of events is so broken that they become independent and the result cannot be said to have probably and naturally accrued from the primary cause, or to have been anticipated." Reynosa v. Pickwick Stages System, 115 Cal. App. 383, 1 P.(2d) 548, 549.

In this case the persons who used the applicators, according to plaintiff's evidence, were trained nurses employed by the plaintiff. They are members of a profession which the law recognizes as one of skill and learning. It has been said that "the professions of doctor and nurse are so closely allied that decisions applicable to one would appear to apply equally well to the other." Moody v. Industrial Accident Commission, 204 Cal. 668, 269 P. 542, 543, 60 A. L. R. 299. The hospital, if it furnished the toothpicks as plaintiff contends, sent them to a professional employed by plaintiff to care for him. If she used them with injurious consequences, her act was certainly one of a responsible and intelligent person, which relieves the defendant of any liability.

The duty of the hospital to furnish suitable supplies and equipment does not, we think, make such defendant liable for furnishing articles which a trained nurse in charge of a patient should know from training and experience and the standards of care ordinarily used in her profession would be dangerous. If the article furnished is obviously unfit for the use for which it is furnished by the hospital, and plaintiff's employee uses it in violation of all of the standards of care of nursing practice, the defendant cannot be chargeable with any injurious effects therefrom. Under this state of facts, the acts of the defendant's employees were neither a proximate cause, nor any cause, of the misuse of the applicators, with resulting injury to the plaintiff. It cannot rightly be said that defendant or its employees should have anticipated that the nurse or physician would voluntarily use an unfit appliance in caring for the patient's wound.

This conclusion requires a reversal of the judgment and makes a consideration of the other points raised by appellant unnecessary. Also, as we hold that, even though all of the evidence relied upon by plaintiff be true, defendant is not liable, there is no need for a new trial.

The judgment is reversed, and the case remanded to the superior court, with directions to dismiss the action.

We concur: CONREY, P. J.; HOUSER, J.

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2 Cal.App.2d 421

YOUNG v. CERRATO.

Civ. 5136.

District Court of Appeal, Third District, California.

Nov. 26, 1934.

Hearing Denied by Supreme Court Jan. 24, 1935.

1. Automobiles 🔑172(6)

Statutory provision that driver contemplating turning on highway must first ascertain if movement can be safely made requires him to consider traffic in rear as well as in front (St. 1925, p. 413, § 130 (a).

2. Automobiles 🔑226(2)

Negligence of driver of overtaking truck in not sounding warning *held* not proximate cause of damage in collision occurring when overtaken truck made left turn at private lane without signal (St. 1931, p. 2125, § 125 (d); St. 1925, p. 413, § 130 (a).

3. Automobiles 🔑226(2)

Driver of overtaking truck whose failure to sound warning was not proximate cause of injury in collision *held* not guilty of contributory negligence (St. 1931, p. 2125, § 125 (d).

4. Automobiles 🔑206

One driving automobile in rear of another may assume that motorist in front will obey law of road, and need not anticipate that such car will leave proper side and cross highway, at least where there is no intersection of public highways and nothing to lead one exercising reasonable care to foresee such action.

5. Automobiles 🔑201(1)

Failure of driver of overtaken automobile to give statutory signal before making left turn at private lane *held* proximate cause of collision with overtaking car (St. 1925, p. 413, § 130 (a).

6. Automobiles 🔑172(6)

Driver of overtaken automobile making left turn at private lane without giving statutory signal *held* negligent (St. 1925, p. 413, § 130 (a).

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Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Della F. Young, administratrix of the estate of John L. Young, against Frank Cerrato. From an adverse judgment, defendant appeals.

Affirmed.

Sandford, Burger & Barry, of San Francisco, for appellant.

Claude Minard and Wm. C. Crossland, both of Fresno, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal by defendant from a judgment entered against him and in favor of plaintiff for damages sustained by plaintiff in the loss of his truck and its cargo.

The accident occurred about 3 miles north of the city of Merced on the Golden State highway, about 7 o'clock on an October evening in 1932. At the time both plaintiff and defendant were proceeding northerly, defendant driving a Ford truck at about 20 miles an hour, was ahead of plaintiff, who was following in a ten-ton Studebaker truck loaded with oranges and grapefruit, going at the rate of 30 to 35 miles an hour. When defendant came abreast of a private lane leading to his destination, he drove his car toward the left and partially across the highway, when the truck of plaintiff struck the rear of defendant's truck, causing both vehicles to overturn.

Defendant testified that he saw the approaching lights of the Studebaker truck in his rear-view mirror prior to making the left turn, and, when asked how far away it then was, stated: "Well, I can't figure because it was night time but I think 300 feet when I looked at him." When the driver of the Studebaker reached a point approximately 100 feet to the rear of the Ford, he gradually turned his truck toward the left, preparatory to passing. When plaintiff's truck was approximately 20 feet to the rear of defendant's car, defendant suddenly turned to the left to enter the driveway. Plaintiff immediately applied his air brakes, locking all wheels, and swung to the right, but the cars collided, causing the damage to plaintiff's truck and cargo, which is the subject of this action.

The trial court found it to be true "that plaintiff's driver failed to give any warning audible signal of his intention to pass defendant's truck," and the court also found that "the defendant at said time and place suddenly made a left-hand turn on the near approach of the plaintiff's truck without any signal of his intention so to turn."

[1-4] The determination of this appeal depends, therefore, upon whether or not the failure of plaintiff to sound a warning horn while in the act of passing the truck of defendant, was such negligence as to compel judgment for defendant as a matter of law.

Various sections of the California Vehicle Act appurtenant to this question are as follows:

"Sec. 125. * * * (d) The driver of an overtaking motor vehicle when traveling outside of a business or residence district, and under other conditions when necessary to insure safe operation, shall give audible warning with his horn or other warning device before passing or attempting to pass a vehicle proceeding in the same direction." (St. 1923, p. 557, as amended by St. 1931, p. 2125.)

"Sec. 130. (a) The driver of any vehicle upon a public highway before starting, turning or stopping such vehicle shall first see that such movement can be made in safety, and if it can not be made in safety, shall wait until it can be made in safety; then, if the operation of any other vehicle may reasonably be affected by such movement, the driver shall give a signal plainly visible to the driver of such other vehicle of the intention to make such movement. Such signal may be given either by the use of the hand and arm in the manner hereinafter provided, or by means of a mechanical or electric device which meets the requirements hereinafter set forth and which has been approved by the division of motor vehicles as hereinafter provided. * * * The signal herein required to be given before turning to the right or left, whether given by means of the hand and arm or by means of an approved mechanical or electric device, shall be given continuously during the last fifty feet traveled by the vehicle before turning." (St. 1923, p. 558, as amended by St. 1925, p. 413.)

It therefore appears from the findings and from the requirements of the California Vehicle Act that plaintiff was negligent, in that he failed to give any audible warning of his intention to pass defendant's truck, and defendant was negligent in that he suddenly made a left turn without giving any signal of his intention so to do. To fix the liability for the accident, it is necessary to determine which of the negligent acts in its natural and continuous sequence produced the collision. Plaintiff was where he had a right to be. Defendant had seen him approaching from the rear, yet, without any indication of his intention so to do, had turned across the highway. Some states hold the driver of an automobile can be held responsible only for what occurs in front of him, but an examination of section 130 (a) of the California Vehicle Act, cited above, clearly places a duty upon the driver who contemplates turning upon the highway to first ascertain if such movement can be safely made, with reference to both front and rear, and, if not, to wait until it can be made in safety, and then shall indicate by a signal his intention so to do. We cannot see where the negligence of plaintiff was a proximate cause of the injury, and therefore we cannot hold him to have been guilty of contributory negligence. One driving in the rear of another car has the right to assume that a motorist will obey the law of the road and is not bound to anticipate that a car will leave its proper side and cross the highway, at least where there is no intersection of public highways, and nothing to lead one in the exercise of reasonable care to foresee such action. Simonsen v. L. J. Christopher Co., 186 Cal. 786, 200 P. 615.

As the court said in the case of McIver v. Allen, 33 Ariz. 28, 262 P. 5, 9, where a car traveling at a rate of 4 or 5 miles an hour was attempting to make a left turn and was damaged by being struck by a car traveling 30 to 45 miles per hour: "It should have been evident to the plaintiff that he was placing himself in a perilous position by turning in front of a car only 150 feet away and approaching at a rate of 30 or 35 miles an hour while he was going at a speed of only 4 or 5. * * * It is true he claims that he had given the proper signal and thought that the drivers of the cars would reduce their speed to such an extent that it would not be dangerous to cross, but it must be remembered that it was between intersections where such a turn was not anticipated to the same extent it would have been at a crossing, that it was nighttime and therefore more difficult to see the hand indicating such an intention, and that it is probable that he withdrew it before the defendant * * * was close enough to see it. The danger of left-hand turns on much-traveled highways between intersections is so great that they should not be attempted without the exercise of extra precaution. The peril of such turns is so well recognized that they are not permitted at all at certain street intersections even upon the exercise of the greatest care. We are of the view, therefore, that, notwithstanding the fact that the defendant * * * may have been running at an unreasonable rate of speed at the time of the accident or so immediately prior thereto, that he did not then have control of his car, he and his codefendant were entitled to an instruction permitting the jury to say whether the plaintiff did not by his own negligence contribute to his injury."

In the case of Litherbury v. Kimmet, 183 Cal. 24, 195 P. 660, 661, the court held in the main opinion that: "The necessity for the driver of a motor vehicle to signal before turning, and particularly before turning to the left, is so great, and the practice of signaling in such a case is so universal and so relied upon, that there is no room for a reasonable difference of opinion as to the conduct of a driver who fails to signal without making certain that there is no one behind him. He is guilty of negligence, and the court is justified in so charging the jury." Upon rehearing it said again: "We are satisfied as to the correctness of this statement as applied to the facts of the particular case, where the motor truck, whose sudden turning from its course to the left caused the collision, was proceeding along a street of a large city, where the coming up of vehicles behind it was always anticipated, and therefore necessarily guarded against, and there was nothing to relieve the driver of his obligation to exercise care in this respect. The statement was, however, not intended as one of universal application, and it is not difficult to conceive of cases to which it would not be at all applicable."

[5] Although the accident in the cited case occurred in a large city, where, as the court said, the coming up of vehicles from behind is always to be anticipated, the collision in the case before the court occurred on the Golden State highway, one of the most traveled thoroughfares between San Francisco and Los Angeles and through the San Joaquin Valley, where trucks and other vehicles are almost constantly passing to and fro. Under these circumstances, where defendant made a left-hand turn across the main traveled highway at night, intending to go into a private driveway, and left his normal position in the road without the giving of any signal of his intention so to do, to a car known by him to be approaching from the rear, it is quite apparent that the proximate cause of the collision was not the omission of plaintiff to sound his horn, but the failure of defendant to obey the rule as prescribed in section 130 (a) of the California Vehicle Act. We cannot say that plaintiff was guilty of contributory negligence as a matter of law in failing to give warning of his intention to pass.

[6] The evidence clearly shows, therefore, negligence on the part of defendant, which negligence was the proximate cause of the collision, and, as stated already, the negligence of plaintiff's driver in failure to comply with the terms of the California Vehicle Act regarding the giving of an audible signal was not the proximate cause of the collision.

The judgment should be affirmed, and it is so ordered.

We concur: PLUMMER, J.; THOMPSON, J.

2 Cal.App.2d 334

SHANE v. HOSPITAL OF THE GOOD SAMARITAN.

Civ. 8426.

District Court of Appeal, Second District, Division 1, California.

Nov. 20, 1934.

Charities ⚿45(2)

Charitable hospital *held* not liable for injuries alleged to have been sustained by infant at her birth through negligence of nurse employed by hospital, where hospital used due care in selection of nurse.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Beverly Rae Shane, a minor, by Harry Shane, her guardian ad litem, against the Hospital of the Good Samaritan. Verdict for the defendant. From an order granting a motion for a new trial, the defendant appeals.

Order reversed, and case remanded, with instructions.

Gibson, Dunn & Crutcher and Philip C. Sterry, all of Los Angeles, for appellant.

John H. Klenke and Elbert E. Hensley, both of Los Angeles, for respondent.

HAHN, Justice pro tem.

This appeal is by defendant from an order granting plaintiff's motion for a new trial.

Plaintiff, a minor, by her guardian ad litem brought this action for damages for injuries alleged to have been suffered on the day of her birth, through the negligence of a nurse employed by defendant which maintained the hospital where plaintiff and her mother were patients.

The answer, in addition to denying the allegations of negligence, alleges that defendant "was a nonprofit sharing eleemosynary, charitable institution, organized and maintained for the purpose of giving hospital attention, nursing and medical aid to the sick and unfortunate; that it had no stockholders and no method of distributing profits, if any were made, and that it was not organized for and had never attempted to realize profits from the operations of its hospital."

At the conclusion of the testimony, defendant moved for a directed verdict upon the grounds that the evidence conclusively established that the Hospital of the Good Samaritan was a nonprofit sharing eleemosynary corporation, not organized for profit, but for the purpose of training nurses and for the care of the sick, including those who were unable to pay wholly or in part for medical and surgical aid, and that at the times mentioned in the complaint the hospital was being operated for the purpose for which it was formed as a charitable institution; that the evidence conclusively established that the Hospital of the Good Samaritan at all times exercised due care in the selection of its servants and agents, etc. This motion was by the court granted, and pursuant to the court's instruction, the jury returned its verdict for the defendant. In due course, plaintiff made a motion for a new trial, which, after argument, was granted.

Appellant in its brief asserts: "The only question presented by this appeal is whether a corporation of the character of the defendant is responsible in damages for the negligence of a nurse engaged in caring for a patient in the hospital." It is well established in this state, and in other jurisdictions by the weight of authority, that "one who accepts the benefit either of a public or of a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at any rate, if the benefactor has used due care in selecting those servants." Powers v. Mass. Homœopathic Hospital (C. C. A.) 109 F. 294, 303, 65 L. R. A. 372; Stonaker v. Big Sisters Hospital, 116 Cal. App. 375, 2 P.(2d) 520; Burdell v. St. Luke's Hospital, 37 Cal. App. 310, 173 P. 1008; Thomas v. German Gen., etc., Soc., 168 Cal. 183, 141 P. 1186; Stewart v. California Medical Missionary & Ben. Ass'n, 178 Cal. 418, 176 P. 46; Schloendorff v. Soc. of New York Hospital, 211 N. Y. 125, 105 N. E. 92, 52 L. R. A. (N. S.) 505, Ann. Cas. 1915C, 581; Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 78 A. 898, 33 L. R. A. (N. S.) 141; Hearns v. Waterbury Hospital, 66 Conn. 98, 33 A. 595, 31 L. R. A. 224; McDonald v. Mass. Gen. Hospital, 120 Mass. 432, 21 Am. Rep. 529; Morrison v. Henke, 165 Wis. 166, 160 N. W. 173; Magnuson v. Swedish Hospital, 99 Wash. 399, 169 P. 828; and 5 R. C. L., p. 375–377.

Counsel for respondent, who, for reasons which appear sufficient, has filed no brief, urged in oral argument that the rule of exemption of charitable institutions from liability to its patrons for injuries suffered through the negligence of its employees has been given recognition in California on the theory of an implied contract, that one who accepts the charity exempts his benefactor from any liability for the negligence of the benefactor's employees or servants. That inasmuch as plaintiff, at the time she suffered the injuries complained of, was an infant incapable of contracting, no implied contract may be imputed to her. Therefore it is argued, since the reason for the rule is not applicable, this case does not come within the rule of nonliability, but must be determined in accordance with the general rules that pertain in negligence cases. Assuming this premise, respondent urges that the court erred in instructing the jury to bring in a verdict for defendant, and that its order granting a new trial was properly made to correct this error. In support of this contention the cases of Thomas v. German Gen., etc., 168 Cal. 183, 141 P. 1186, 1188, and Stewart v. California Medical Missionary & Ben. Ass'n, 178 Cal. 418, 176 P. 46, are cited.

While our courts in the various jurisdictions are almost unanimous in holding that charitable hospitals are immune against the claims of patients who suffer injuries through the negligence of hospital employees, there is a wide divergence in the views or theories assigned for this doctrine of nonliability. An examination of the cases and authorities dealing with this question discloses that four different theories are advanced in support of the doctrine:

First. That an implied contract is entered into by the patient when he accepts the benefit of the charity, that in consideration therefor he releases his benefactor from any claim arising from injuries he may suffer through the negligence of any employee of the benefactor.

Second. That the funds provided for the maintenance of the charity constitute a trust fund contributed for a specific purpose, which does not include that of payment of claims of beneficiaries of the charity for negligence of its employees.

Third. The relation of the person whose negligence caused the injury does not bring the case within the rule of respondeat superior.

Fourth. It is contrary to public policy to permit funds contributed for the care of the sick to be used for the payment of a claim for damages resulting from the negligence of a servant in whose selection reasonable care was used by those in charge of the charity.

This question has been the subject of much controversy in state and federal courts, and is responsible for a number of extended judicial opinions, which in turn vigorously defend and assail the several reasons assigned as justifying the rule. We shall not undertake to review these cases, or indulge in any extended discussion of the merits or demerits of the theories advanced. While the conclusions are in accord, the reasons advanced for the conclusions are irreconcilable. Inasmuch as the undisputed facts bring the instant case well within the most limited application of the rule as recognized in the several jurisdictions, we will approach at once the point raised by respondent and determine to what extent, if at all, the cases she cites support her contention.

In the case of Thomas v. German Gen., etc., Soc., supra, plaintiff was employed as a chef in a hospital maintained by defendant. While so employed he was injured by a fall in an elevator shaft left open as a result of the negligence of a fellow employee. The judgment in favor of plaintiff was reversed on the ground that the injury was proximately caused by the negligence of a fellow employee, for which defendant was not liable. At the close of the opinion in that case, the following statement appears: "A final contention of appellant is that it is in no way responsible, by reason of the fact that it is a charitable institution, and that an action against it such as this will not lie. Such was the doctrine of some of the earlier cases. We need not enter into an elaborate discussion of the question. All of the authorities pro and con have been elaborately collated and learnedly reviewed in Basabo v. Salvation Army, 35 R. I. 22, 85 A. 120, 42 L. R. A. (N. S.) 1144. With the conclusion there reached we are in accord. That conclusion is that the true doctrine amounts to this: that where one accepts the benefit of a public or of a private charity he exempts by implied contract the benefactor from liability for the negligence of the servants in administering the charity, if the benefactor has used due care in the selection of those servants."

In the Stewart Case, 178 Cal. 418, 176 P. 46, 47, the decision turned on the question as to the sufficiency of the articles of incorporation and by-laws of defendant to support appellant's contention that the evidence conclusively proved that defendant's hospital was operated and maintained as a charitable institution. The court held against appellant's contention.

In addition to the argument that the cited cases are not controlling, appellant points to the following declaration in the opinion in the Stewart Case as being decisive on the point. "The courts of this country have almost unanimously arrived at the conclusion that hospitals organized for charitable purposes are not liable to their patients for injuries arising from the negligence of their employees, where reasonable care is used in the selection and retention of the employee, although the reasons given for this rule vary in the different states. [Citing cases.] The question was also considered by this court in Department (July, 1914) in Thomas v. German Gen., etc., Society, 168 Cal. 183, 188, 141 P. 1186. It was there said, without discussing the doctrine that: 'All of the authorities pro and con have been industriously collated and learnedly reviewed in Basabo v. Salvation Army, 35 R. I. 22, 85 A. 120, 42 L. R. A. (N. S.) 1144. With the conclusion there reached we are in accord. That conclusion is that the true doctrine amounts to this: That where one accepts the benefit of a public or of a private charity, he exempts by implied contract the benefactor from liability for the negligence of the servants in administering the charity, if the benefactor has used due care in the selection of those servants.' In view of the fact that the court had arrived at the conclusion that under the ordinary rules pertaining to corporate liability the defendant in that case was not liable for the injury complained of because of the fact that the proximate cause of the injury was the negligence of a fellow servant, for which the defendant was not in any event liable, and in view of the further fact that the court does not attempt to apply the rules enunciated in Basabo v. Salvation Army, supra, to the facts of that case, the case cannot be considered as having committed this court to any one of the several theories on which the nonliability of charitable corporations is based, or to the doctrine of nonliability."

This direct holding that the Thomas Case is not to be regarded as establishing in California the doctrine of "implied contract" as the basis for the rule of nonliability as to charitable institutions, as well as the reasons therein stated for this conclusion, deprive respondent of her main support urged in justification of the trial court's ruling. We do not feel it necessary in order to meet the fair requirements of this opinion to make a judicial declaration as to the doctrine which should be considered as forming the proper basis for the rule of nonliability. Other than in the two California cases cited, our attention has been directed to no other California case wherein the court, in applying the rule, deemed it necessary to declare the proper reason for the rule. In arriving at this conclusion, we are moved to quote from the opinion of the United States Circuit Court of Appeals, in Powers v. Mass. Homœopathic Hospital, 109 F. 294, at page 304, 65 L. R. A. 372, in which case the author of the opinion made a most exhaustive review of the cases wherein this question was considered: "Though we feel constrained to differ from the reasoning followed by some other courts in reaching the same conclusion, we are not unmindful that the identity of conclusion reached, though by different roads, is a strong proof of its correctness. Doubtless a weight of authority is more overwhelming if it is identical in reasoning as well as in result, but identity of result is in itself no mean argument for its justice."

It is not contended by respondent that the evidence does not bring defendant well within the definition of a "charitable institution" as that term has been defined by the weight of authority. Nor is it suggested that there is any evidence in the record that would support any other finding than one that defendant exercised due care in employing the nurse whose negligence caused plaintiff's injuries.

Appellant, in closing its brief, urges that even though the theory of "implied contract" should be recognized in this state, still by the weight of reason and authority plaintiff should be denied a right of recovery under the undisputed facts. There is merit in this contention. No case has been brought to our attention from any jurisdiction in which the rule of nonliability of charitable institutions is recognized where any exception has been made to its application because the injured person was a minor. In the cases of Weston's Adm'x v. Hospital of St. Vincent of Paul, 131 Va. 587, 107 S. E. 785, 23 A. L. R. 907; Hogan v. Chicago Lying-in Hospital and Dispensary, 335 Ill. 42, 166 N. E. 461; and Parks v. Northwestern University, 218 Ill. 381, 75 N. E. 991, 2 L. R. A. (N. S.) 556, 4 Ann. Cas. 103, the plaintiffs were minors but held not entitled to recover for injuries received because of the nonliability doctrine. While the reasons assigned for refusing in each case a right of recovery were not the same, the fact that the conclusions in all three cases are in accord, "is a strong proof of its correctness." If it can be successfully urged that a proper determination of the question requires a declaration of the theory or basis upon which the rule may be foundationed, reason and the weight of authority would furnish an adequate basis in the doctrine of public policy, the considerations in support of which would seem to be more convincing and less vulnerable to attack than those advanced in support of any of the other theories which have had judicial sanction.

For the reasons indicated we conclude that the trial court erred in granting plaintiff's (respondent here) motion for a new trial.

The order is reversed, and the case remanded, with instructions that judgment be entered on the jury's instructed verdict for defendant.

We concur: CONREY, P. J.; YORK, J.

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2 Cal.App.2d 426

RYDER v. RYDER.

Civ. 5164.

District Court of Appeal, Third District, California.

Nov. 26, 1934.

Hearing Denied by Supreme Court Jan. 24, 1935.

1. Divorce ⇨327

As respects validity of foreign divorce, jurisdiction over subject-matter of divorce rests upon domicile, or at least residence of one of parties.

2. Domicile ⇨4(2)

Generally, domicile is changed only upon abandonment of first place of domicile with intent not to return and on taking up residence in another place with intent of permanently residing there.

3. Judgment ⇨831

Record of judgment rendered in foreign country may be contradicted as to facts necessary to give foreign court jurisdiction if want of jurisdiction appears on face of record or is shown as to subject-matter or person (Code Civ. Proc. § 1915 et seq.).

4. Divorce ⇨327

Foreign divorce obtained through simulated residence in bad faith may be attacked in state of real matrimonial domicile, and party sought to be bound thereby may impeach jurisdiction of foreign court by extraneous evidence (Code Civ. Proc. § 1915 et seq.).

5. Divorce ⇨327

Divorce obtained by husband in Mexico on ground of incompatibility, without either party having established domicile in Mexico, *held* subject to impeachment by wife in divorce action brought by her in state of matrimonial domicile, though Mexican decree recited that husband had established a domicile in Mexico (Code Civ. Proc. § 1915 et seq.).

6. Marriage ⇨40(11)

Person assailing marriage as invalid has burden to show previous marriage of one of spouses and that such previous marriage has not been dissolved by death or judicial decree.

7. Marriage ⇨50(1)

Evidence in divorce action brought by wife against husband, who had obtained Mexican divorce and thereafter remarried, *held* sufficient to sustain plaintiff's burden of proving invalidity of husband's second marriage (Code Civ. Proc. § 2061).

8. Divorce ⇨330

Wife *held* not estopped by her written submission to jurisdiction of courts of Mexico in husband's Mexican divorce suit, or by husband's subsequent remarriage, to assert, in her subsequent divorce action, that Mexican divorce was invalid.

9. Divorce ⇨326

Consent of wife cannot confer jurisdiction to grant husband decree of divorce in a foreign jurisdiction.

10. Divorce ⇨211, 223

Amount allowed to wife for support and for counsel fees and costs in divorce action is matter almost entirely within trial court's discretion.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action for divorce by Sarah Frances Ryder against Royal Simmeral Ryder. From orders granting plaintiff's motion for maintenance, counsel fees, and court costs, defendant appeals.

Affirmed.

Charles Kasch, of Ukiah, for appellant.

Taft & Spurr, of Ukiah, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

In this action for divorce, the trial court granted the motions of plaintiff for maintenance, counsel fees, and court costs. From these orders defendant appeals, claiming that the relationship of husband and wife had terminated prior to the filing of the complaint and the making of the orders here complained of, by virtue of a decree of divorce granted defendant in the state of Chihuahua, in the republic of Mexico. Defendant also asserts that in any event the allowance made was excessive, and that plaintiff is estopped by her conduct from claiming the invalidity of the Mexican divorce.

The parties hereto were married in San Francisco in 1907, and in 1922 moved to the county of Mendocino, where defendant was and is employed, and where they lived together continuously as husband and wife until some time probably in May, 1933.

In January, 1933, defendant informed plaintiff he desired a divorce, and submitted a property settlement which was executed by the parties. In June, 1933, defendant submitted to plaintiff for her signature a certain document in the following words:

"Luis A. Trias, Mexican Lawyer, Ciudad Jurez, Chih.

"To the Judge of the First Instance.

"Present.—

"Sarah F. Goss Ryder, of majority, Northamerican, respectfully appears to state:

"That I have taken cognizance of that certain divorce filed against me in this Court by my husband Royal Simeral Ryder and respectfully submit:

"That I declare myself as being in conformity with the purport of its terms, as presented in this Honorable Court, and by virtue of the aforementioned and in accord with article 19 of the Law of Divorce, I attentively pray that your Honor pronounce Judgment of Divorce within the three days as provided by law.

"Wherefore I petition the legal necessity hereabove.

"State of , County of , ss.

"Sarah F. Ryder, being by me first duly sworn, deposes and says:

"That she is the answering party in the above entitled case and has read the foregoing confession of judgment and knows the contents thereof and that the same is true of her own knowledge except as to matters as are therein stated upon her information or belief, and as to those matters that she believes it to be true.

"Sarah F. Ryder

"Subscribed and sworn to before me this day 30th of June, 1933.

"J. C. Hurley

"Notary Public in and for the County of Mendocino, State of California."

On July 3, 1933, there was filed in the first civil court of Bravos district, Jurez, state of Chihuahua, upon behalf of defendant, a petition for divorce upon the ground of incompatibility, and thereafter on July 7, 1933, a decree purporting to dissolve the marriage of plaintiff and defendant was issued out of said court. Thereafter, in August, defendant went through a marriage ceremony in the county of Los Angeles with a woman other than plaintiff, and since that time they have been living together as husband and wife.

It further appears that defendant had never been in Mexico except perhaps for a very brief period several days prior to the time herein referred to, when he visited Tia Juana, Mexico.

It will be observed that the document hereinbefore set forth was addressed to no court, bore no filing marks of any proceeding, apparently refers to a divorce filed several days prior to the proceedings here involved, and was produced by defendant himself at the hearing herein. It is quite apparent that the courts of the republic of Mexico never acquired jurisdiction of the res nor of the parties to the action. Under these facts and circumstances, to hold such a proceeding as constituting a valid divorce would do violence to all our conceptions of such actions and tend to utterly destroy the sanctity of the marriage status, as well as upholding a fraud upon the courts of Mexico itself.

We are not here concerned with the "full faith and credit" clause of the Constitution of the United States, for that provision is not applicable to judgments of foreign countries, nor is our attention called to any treaty existing between the United States and Mexico dealing with questions of divorce. However, section 1915 et seq., Code of Civil Procedure recognizes the effect of foreign judgments where the foreign tribunal has jurisdiction to act in the cause, over the parties and over the thing, when the specific thing is the subject of the judgment, but under the facts here existing no assistance is accorded defendant and appellant by that section, because of the lack of the very elements specified.

[1-3] The general rule is that jurisdiction over the subject-matter of divorce rests upon domicile, or at least residence, of one of the parties, and a decree of divorce rendered in a foreign jurisdiction may be impeached and denied recognition upon the ground that neither of the parties had such domicile or residence at the divorce forum notwithstanding the recitals in the decree. Note, 39 A. L. R. 677, and cases cited. Neither recitals in the decree or consent of the parties can confer jurisdiction in the face of evidence that plaintiff in the divorce action did not have a bona fide residence. It is a general rule that domicile is changed from one place to another only upon the abandonment of the first place of domicile with the intent not to return and by taking up a residence in another place

with the intention of permanently residing in that place. 9 R. C. L. 542. The first essential for the validity of a decree of divorce between parties is that it should be pronounced by a competent court of jurisdiction, and one of whom at least is a bona fide subject of that jurisdiction. Even in this country, where it is prescribed by the Constitution that full faith and credit must be given in each state to the judicial proceedings of another, it is well settled that the record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction, and, if the want of jurisdiction appears on the face of the record or is shown either as to subject-matter or the person, the record will be regarded as a nullity. Thompson v. Whitman, 18 Wall. (85 U. S.) 457, 21 L. Ed. 897. The rule is certainly as strong, if not stronger, when applied to a court of a foreign country. It would be unfair to the courts of Mexico to presume that it would have been a party to such a proceeding if it had known that neither plaintiff nor defendant therein had ever been in Mexico during the year 1933, that during all of the time in question defendant maintained his residence and his employment in California, and that plaintiff had never consented to submit to the jurisdiction of the Mexican courts.

[4] A foreign divorce obtained through simulated residence and not in good faith is open to attack in the state of the real matrimonial domicile, and the party sought to be bound by it may always impeach its validity and escape its effect by showing that the court which rendered it had no jurisdiction over the parties or the subject-matter, and the jurisdiction of such court may be controverted by extraneous evidence. Kadello v. Kadello, 220 Cal. 1, 29 P.(2d) 171; Delanoy v. Delanoy, 216 Cal. 27, 13 P.(2d) 719, 86 A. L. R. 1321; Galloway v. Galloway, 116 Cal. App. 478, 2 P.(2d) 842; Broder v. Broder, 122 Cal. App. 296, 10 P.(2d) 182; Warren v. Warren, 127 Cal. App. 231, 15 P.(2d) 556, 560; Steinbroner v. Steinbroner, 30 Cal. App. 673, 159 P. 235; Fox v. Mick, 20 Cal. App. 599, 129 P. 972; Thompson v. Whitman, 18 Wall. (85 U. S.) 457, 21 L. Ed. 897; Hanley v. Donoghue, 116 U. S. 1, 6 S. Ct. 242, 29 L. Ed. 535.

As was said in the case of Warren v. Warren, supra: "A bona fide residence, however, is essential to jurisdiction, and a valid divorce decree cannot be founded upon a simulated domicile or a residence undertaken for the purpose of securing such a decree."

[5] However, in the instant case it is apparent from the face of the record that a fraud had been perpetrated upon the courts of Mexico, for it is recited in the decree itself that "said plaintiff had established his domicile in compliance with the existing laws," and "that the court's jurisdiction was established by the certificate of the plaintiff's domicile duly registered in the Public Registry."

There is nothing in the record to indicate what the law of Mexico is concerning divorce. We have been directed to no statute or code or other law of that country governing the subject of divorce. If, however, it be assumed that the laws of that country require no residence nor the presence of the parties within its territory as a basis of jurisdiction, and that the formal requirements established by Mexican law were met, then the divorce cannot be recognized under the laws of this state. A decree of divorce rendered by any jurisdiction in which neither of the parties have domicile is not entitled to full faith and credit and will not be recognized and enforced in California.

It also appears that the divorce was granted upon the grounds of incompatibility, which is not a ground for divorce in California. The matrimonial domicile of the parties having at all times been in the state of California, any case for divorce urged by defendant in the courts of Mexico must necessarily have occurred within the state of California. Under the laws of California, no cause of action having been set forth, this state cannot recognize a divorce upon the grounds alleged.

The recent case of Bergeron v. Bergeron, 192 N. E. 86, 89, decided by the Supreme Court of Massachusetts, is quite similar to the present case, and reaches the conclusion that "to recognize the Mexican divorce as valid in the circumstances here disclosed would frustrate and make vain all State laws regulating and limiting divorce. By such recognition State control over the marriage relation would be destroyed."

[6-8] Appellant herein also contends that, having established the fact of his second marriage, the presumption is that such marriage is valid and the burden of proving the contrary is on plaintiff. Such is the rule. The burden of proof is on the party assailing the marriage to show not only the former marriage but also that it has not been dissolved by death or judicial decree. In this case, however, we have ample evidence to support the burden of proof resting upon plaintiff. Both parties to the first marriage were before the court. Plaintiff testified positively to its continuous existence, and the failure of defendant, being present, to introduce evidence showing its termination created a presump-

tion which supported the contention of plaintiff that the first marriage between the parties hereto was still in full force and effect. Code Civ. Proc. § 2061. Appellant also contends that, by reason of the written submission by plaintiff to the jurisdiction of the courts of Mexico and the subsequent marriage of defendant, plaintiff is now estopped from claiming the existence of the marriage relation between the parties hereto. It has been repeatedly held that any contract between the parties having for its object the dissolution of the marriage contract is void as against public policy. 9 Cal. Jur. 636; Roberts v. Roberts, 83 Cal. App. 345, 256 P. 826; Whiting v. Whiting, 62 Cal. App. 157, 216 P. 92. In Rehfuss v. Rehfuss, 169 Cal. 86, 145 P. 1020, our Supreme Court has defined the position of the state as a party in a divorce action, where it says: "Where an attempt is made through the courts to undo a marriage the state becomes in a sense a party to the proceedings, not necessarily to oppose, but to make sure that the attempt will not prevail without sufficient and lawful cause shown by the real facts of the case, nor unless these conditions are found to exist at the time the decree is made upon which the state permits a divorce to be granted. The state has an interest in the maintenance of the marriage tie, which neither the collusion nor the negligence of the parties can impair."

[9] It requires the citation of no authority that the consent of the wife could not confer jurisdiction to grant the husband a decree of divorce within the United States, and the same rule extends to a foreign jurisdiction. It would be a strange situation if the court where the parties reside were bound by the rules of public policy and the parties could, by subterfuge or evasion, by correspondence, obtain a decree in another forum.

It also should be noted that the instrument hereinbefore set forth purporting to consent to the jurisdiction is merely a blanket authorization, and directed to no particular court or tribunal, and does not appear even to have been presented or recorded by any tribunal, and, judging from the tense of the document, did not refer to the proceedings here involved. The purported consent, being void, however, as against public policy, cannot in any event create an estoppel.

[10] Lastly, it is urged that, in view of the financial condition of the defendant, the amounts allowed by the court for support and for counsel fees and costs on appeal are excessive. This is a matter almost entirely within the discretion of the trial court which has already passed upon the matter and determined in its opinion the proper amount to be allowed for maintenance, court costs, and attorney fees. While the amounts appear to be somewhat liberal, there is nothing before us to justify our substituting our opinion in the place of that of the trial court.

For the reason as stated before, the judgment and orders are hereby affirmed.

We concur: PLUMMER, J.; THOMPSON, J.

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2 Cal.App.2d 287

PEOPLE v. BRUNWIN et al.

Cr. 172.

District Court of Appeal, Fourth District, California.

Nov. 19, 1934.

Hearing Denied by Supreme Court Dec. 18, 1934.

1. Larceny 🔑5

Under statute, unlawful taking of anything forming part of realty and which is severed from the realty at time of taking is larceny, and oil removed from ground by the persons charged becomes personalty, and unlawful taking thereof is larceny (Pen. Code, § 495; Gen. Laws 1931, Act 4194, § 1).

2. Courts 🔑90(7)

Language in opinion of District Court of Appeals *held* not binding as precedent on District Court of Appeals for another appellate district, though petition for hearing of case in Supreme Court was denied.

3. Larceny 🔑32(7)

Lessee in possession having exclusive right to extract and take oil from land *held* to have sufficient interest to complain of alleged felonious extraction and taking away of oil by defendants, and indictment was not fatally defective for failure to allege that lessee had rights in strata from which oil was taken and severed by defendants (Pen. Code, § 495; Gen. Laws 1931, Act 4194, § 1).

4. Larceny 🔑32(1)

Indictment for theft must charge that property was not property of defendants, but exact status of legal title need not be meticulously alleged.

5. Larceny ⚷**7**

One who has right of possession as against thief is, as against the latter, the owner.

6. Larceny ⚷**30(1)**

Theft indictment alleging that certain corporation owned and held in possession exclusive right to extract oil, and that defendants, without such corporation's consent, willfully and feloniously entered upon land and converted certain realty, namely stated number of barrels of crude oil, into personalty by severing it from land with felonious intent and stole and carried away such oil, *held* sufficient to charge larceny of personalty (Pen. Code, § 495; Gen. Laws 1931, Act 4194, § 1).

◆

Appeal from Superior Court, Kern County; Robert S. Lambert, Judge.

Prosecution against Bert Brunwin, Abe Bernstein, and Sam Bernstein, for conspiracy to commit grand theft and for grand theft. From an order sustaining a demurrer to the indictment and providing that the defendants be discharged and their bail exonerated, the People appeal.

Reversed and remanded, with directions.

Hearing denied by Supreme Court; PRESTON, J., dissenting.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., Thos. Scott, Dist. Atty., Norman F. Main, Deputy Dist. Atty., and F. E. Borton, all of Bakersfield, for the People.

Hyman Schwartz, of Los Angeles, and J. R. Dorsey, of Bakersfield, for respondents.

JENNINGS, Justice.

The people appeal from an order of the superior court of Kern county sustaining the demurrer interposed by the defendants to an amended indictment and providing that the defendants be discharged and their bail exonerated.

The amended indictment contains six counts. In three of these counts the defendants are charged with having conspired to commit the crime of grand theft. In the remaining three counts the defendants are charged with having committed the offense of grand theft.

Examination of the record and of the briefs filed by counsel herein indicates that the same legal problems appertain to each count of the indictment. It may be conceded that, if the trial court was correct in sustaining the demurrer to any single count, its action in sustaining the demurrer to all counts and in ordering the discharge of the defendants was correct and must be upheld on this appeal.

For the purpose of illustrating the problems which are here presented, the fourth count of the indictment has been selected. Omitting the legal description of the land affected, it is in the following language:

"That on or about the 5th day of December, 1933, Pacific Western Oil Company, a corporation, was the owner and holder and in possession of the sole and exclusive right to drill for, produce, extract, and take petroleum oil from the following described lands, real estate and realty in the County of Kern, State of California, to-wit: * * * and was then and there in the sole and exclusive possession of and entitled to the possession of said land, real estate and realty for the purpose of drilling, producing, extracting and taking therefrom such crude petroleum oil, and was then and there the owner and in possession of all crude petroleum oil in, on and within said lands, real estate and realty, and that said crude petroleum oil was then and there a part of said lands, real estate and realty.

"That at said time said Pacific Western Oil Company had discovered in and was then and there producing and engaged in producing said crude petroleum oil on and from said lands, real estate and realty. That on or about said 5th day of December, 1933, the said Bert Brunwin, Abe Bernstein, and Sam Bernstein, against the will and without the consent of said Pacific Western Oil Company, and willfully, intentionally, unlawfully, and feloniously, did enter in, into, on, and upon said lands, real estate and realty of said Pacific Western Oil Company, and convert certain manner of real estate, to-wit: 1004 barrels of said crude petroleum oil of the value of $572.28, lawful money of the United States, into personal property by severing the same from said lands, real estate and realty with felonious intent to and did so sever from said lands, real estate and realty and steal, take and carry away said crude petroleum oil, contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the People of the State of California."

The ground of demurrer to this pleading which was sustained by the trial court was that the facts which are therein stated do not constitute a public offense.

[1] The chief contention of the defendants in their attack upon the aforesaid count of the indictment which evidently prevailed in the trial court and which forms their principal contention for affirmance of the court's order is that the pleading shows on its face that the property alleged to have been taken and converted was oil which at the time of taking formed part of the realty from which it was removed, and that the offense of larceny of realty is unknown to the law.

Appellant relies upon two California statutes to support its contention that the pleading is sufficient and that the court's action in sustaining the general demurrer of respondents was erroneous.

These statutes are section 495 of the Penal Code and section 1 of Act 4194 of the General Laws 1931. The former of these statutes is in the following language: "Severing and removing part of the realty declared larceny. The provisions of this chapter apply where the thing taken is any fixture or part of the realty, and is severed at the time of the taking, in the same manner as if the thing had been severed by another person at some previous time."

The latter statute is as follows: "Grand larceny. Every person who shall convert any manner of real estate of the value of fifty dollars and upwards into personal property, by severing the same from the realty of another, with felonious intent to and shall so steal, take, and carry away the same, shall be deemed guilty of grand larceny, and upon conviction thereof shall be punishable by imprisonment in the state prison for any term not less than one year nor more than fourteen years."

Section 495 of the Penal Code is found in chapter 5 of title 13 of part 1 of the code. Part 1 is entitled "Crimes and Punishments." Title 13 bears the title "Crimes against Property." Chapter 5 is entitled "Larceny [Theft]."

The plain meaning of the language employed in section 495 would appear to indicate a clear legislative intent to denounce as a crime the unlawful taking of anything which forms a part of the realty and which is severed from the realty at the time of taking. As above noted, respondents contend that oil in place in the ground forms a part of the realty. Obviously, oil which has been removed from the ground is personal property and the unlawful taking thereof would constitute larceny just as would the unlawful taking of any other form of personalty.

Respondents urge that, by the use of the language "Where the thing taken is any fixture or part of the realty," the Legislature intended to extend the definition of larceny to include the unlawful taking of fixtures or articles similar to fixtures. To accomplish this result they supply an adjective to qualify the noun "Part" in the first sentence of the above-quoted statute. The adjective which they would thus supply is the word "other." It may be conceded that, if the limiting adjective "other" appeared so that the language were "Where the thing taken is any fixture or other part of the realty," it might well be argued that the Legislature intended to go no further than to denounce the unlawful taking of fixtures and such articles as are like or similar to fixtures. However, the word "other" does not occur in the statute and its interposition is unjustified. The nouns "fixture" and "part" are separated and distinguished by the disjunctive "or" without the use of any qualifying or limiting adjective preceding and modifying the latter noun. We think that the language is clear, and that the suggestion of respondents would involve an unnecessarily strained construction of its plain and obvious meaning.

However, if the contention of respondents as to the proper meaning of the language of section 495, Penal Code, be sustained, we can find no reason to doubt that, by the enactment of Act 4194 of the General Laws, the Legislature evidenced an unmistakable intention to denounce the conversion of real estate into personal property by severance from the soil as larceny. The language which is here employed is too plain to admit of doubt. It may be remarked in passing that the language of that count of the indictment here under consideration indicates most strongly that the pleader obviously intended to frame the pleading in conformity with the provisions of this statute. In this we think he was successful, and, unless there is some good reason why petroleum oil should have a different status from other substances which form a part of the land so that it must be declared that as to oil a different rule prevails and the unlawful taking of it cannot, because of its nature, be regarded as coming within the broad inhibition of the latter statute, we must conclude that the trial court erred in holding that the unlawful taking of oil in place in the land and its severance from the land does not constitute larceny.

Respondents rely on the decision in People v. Williams, 35 Cal. 671. This case was decided in 1868. In it the defendant was charged in an indictment with having taken and stolen from a certain named corporation 52 pounds of gold-bearing quartz rock. He was convicted of the crime of grand larceny and thereupon moved the trial court to arrest the judgment on the ground that the indictment was insufficient. The motion prevailed, and the people appealed from the court's order arresting judgment. The order was affirmed on the ground that the indictment was fatally uncertain, in that it did not sufficiently allege that the rock was personal property and not a part of the realty. The ground of the decision was that an injury to real estate was not indictable at common law, that it was therefore not larceny to steal anything which adhered to the soil, and that the Legislature had passed no statute denouncing as larceny the stealing of anything which adhered to the soil and formed a part of it. In the final sentence of its opinion the court deprecated the necessity of applying the common-law rule, and stated that it adverted to the question "mainly for the purpose of directing the attention of the Legislature to a subject which appears to demand a remedial statute."

In 1872, the Legislature of California enacted three statutes which materially relaxed the rigidity of the common-law rule which, in effect, provided that realty could not be the subject of larceny. Two of these statutes, section 495, Penal Code, and Act 4194, have already received attention. Section 495 of the Penal Code was enacted on February, 14, 1872, and Act 4194 was approved on March 6, 1872. The third statute is Act 4195 of the General Laws 1931, approved on March 20, 1872. This last-mentioned statute provides that: "Every person who shall feloniously steal, take, and carry away, or attempt to take, steal, and carry from any mining claim, tunnel, sluice, undercurrent, riffle-box, or sulphurate (sulphuret=) machine any gold dust, amalgam, or quicksilver, the property of another, shall be deemed guilty of grand larceny. * * *" It is our opinion that section 495, Penal Code, and Act 4194 are in pari materia, and that both laws denounce the unlawful taking of realty as larceny. It is also our opinion, as heretofore indicated, that, if it may be assumed that the former statute was restricted in scope to the taking of fixtures or of some other article or thing affixed to realty like fixtures, the latter statute is not subject to so narrow an interpretation and provides a comprehensive denouncement of the severance of realty as larceny. Act 4195 is by its very terms limited in its operation to the felonious taking of gold dust, amalgam, or quicksilver from mining claims, etc.

In People v. Opie, 123 Cal. 294, 55 P. 989, the defendant was charged in an information with stealing gold ore. The pleading was in the usual form whereby grand larceny was charged, and it was objected that it was fatally defective. The Supreme Court stated that, under the authority of People v. Williams, supra, the contention would have weight, but that the Legislature, with a view to modifying the law as there declared, had enacted Act 4194, whereby the stealing of gold ore, whether severed from the earth or not by the party charged, was made a crime.

Respondents place much reliance upon People v. Cummings, 114 Cal. 437, 46 P. 284, as an authority supporting their contention that the various statutes to which consideration has heretofore been given are restricted in their operation, and that there is not to be found in the laws of this state any statute which covers the stealing of oil which it is contended forms a part of the realty, and that therefore the trial court's action in sustaining the demurrer to the amended indictment was proper and must be upheld. In this case, the defendant was accused of the crime of obtaining two parcels of land by false pretenses. A general demurrer to the information was sustained, and on appeal by the people the trial court's order was affirmed. The basis of the opinion was that section 532, Penal Code, under which the information was drawn, did not include a case wherein one was charged with defrauding another of real estate. In its opinion the court declared that the offense of false pretenses under the English statutes had always been construed as largely analogous to and closely bordering upon that of larceny, and as having application only to personal property which was capable of manual delivery and which could be the subject of the offense of larceny, and that realty which was incapable of larcenous asportation was not regarded as requiring from the criminal law the same protection as personalty. At the time this case was decided, section 532 of the Penal Code provided that "every person who * * * defrauds any other person of money * * * or property * * * is punishable in the same manner and to the same extent as for larceny of the money or property so obtained." It must be conceded that the reasoning of the case which, in the final analysis, rests upon the proposition that realty cannot be the subject of larceny, is favorable to the contention of respondents.

The case was decided in 1896, and section 495 and Act 4194 had then been on the statute books for 24 years. Nevertheless, no reference was made to these statutes in the opinion, and it seems to have been assumed that in California realty could not be the subject of larceny.

[2] In 1905, the Legislature amended section 532 of the Penal Code (St. 1905, p. 685) and enlarged its scope to include the defrauding by one person of any other person "of money, labor, or property, *whether real or personal.*" (Italics ours.) Notwithstanding the amendment, it was held in People v. Folcey, 78 Cal. App. 62, 247 P. 916, 917, decided in 1926, that section 532, Penal Code, fails to provide that it is a crime to obtain real property by fraudulent pretense, in that the only portion of the action which provides for any punishment for a violation of the statute provides that the punishment shall be "in the same manner and to the same extent as for larceny of the money or property so obtained." The opinion further stated that "the only definition of larceny contained in our Codes is that contained in Penal Code, §§ 484–488, 502½, 538, and in General Laws (Deering's 1923 Ed.) Acts 4194, 4195, and 5233, § 64, subd. 29, all of which are limited to personal property." In view of this statement it must be conceded that People v. Folcey is authority for the contention of respondents. However, as was pointed out in People v. Rabe, 202 Cal. 409, at page 419, 261 P. 303, 307 "we are not bound to accept the language" of People v. Folcey "as precedent," although it is true that a petition for a hearing of the case in the Supreme Court was denied. In People v. Maddux, 102 Cal. App. 169, 282 P. 996, the defendant had been convicted of the crime of grand theft. From the context of the opinion it is apparent that the only evidence which was adduced during the trial tending to prove that he had committed the offense of which he was convicted showed that he had obtained real property by means of false pretenses. On appeal the defendant contended that real property cannot be the subject of larceny and therefore cannot be the subject of obtaining property under false pretenses. In support of the contention thus advanced, he relied on People v. Cummings, supra, and People v. Folcey, supra. The contention did not prevail. The appellate court remarked that the cited cases stated a doctrine which, if it still obtained, might lend support to the defendant's contention, but that, unhappily for him, the doctrine was highly technical and unsatisfactory, and, so far as the case then before the court was concerned, had been modified, if not entirely repudiated, by the Supreme Court in People v. Rabe, supra. In view of the stricture upon the language used in the decision in People v. Folcey, as announced in People v. Rabe, supra, and in view of the pronouncement in People v. Maddux, supra, that People v. Folcey states a doctrine which has been modified, if not repudiated, a close examination and analysis of the decision in People v. Folcey is warranted. It is immediately obvious that exactly what was there decided was that section 532 of the Penal Code fails to provide that it is a crime to obtain real property by fraudulent representation or pretense and that the amendment of the statute by the Legislature in 1905, which amendment consisted merely of the insertion of the words "whether real or personal," had no effect, so far as real property is concerned, since the only part of the statute which provided any penalty for its violation remained unamended as follows: "Is punishable in the same manner * * * as for larceny of the money or property so obtained." The very general statement contained in the opinion that "the only definition of larceny contained in our Codes is that contained in Penal Code, §§ 484–488, 502½, 538, and in General Laws (Deering's 1923 Ed.) Acts 4194, 4195, and 5233, § 64, subd. 29, all of which are limited to personal property," was not necessary to the decision and is therefore dictum. Furthermore, in view of the plain language of Act 4194, we are forced to the conclusion that the statement is not strictly correct. In considering the language of Act 4194, having particularly in mind its comprehensiveness, the following language from People v. Roland, 134 Cal. App. 675, 681, 26 P.(2d) 517, 519, is apropos: "The point is that although in defining theft, the statute may not expressly denounce particular varieties of felonious acts which may result in defrauding one of real property, nevertheless, without such particularization, the language of the statute may be so broad or general in its nature that real property may be the subject of the offense." The language of Act 4194 is most comprehensive and its meaning is clear. We can arrive at no other conclusion than that by this statute the Legislature has unmistakably manifested its intention to make real property the subject of larceny, and that the act does denounce the conversion of real property, by severance with the intention of stealing it, as larceny.

[3-5] In support of the trial court's action in sustaining the demurrer to the amended indictment, respondents further contend that

the oil in the ground was the property of the owner of the land and not of the lessee who merely had the right to prospect and to drill therefor, and that the lessee had no property right in the oil until it was captured and brought to the surface. It is further urged that the indictment is fatally defective, in that it fails to allege that the complainant lessee has any rights in and to the strata from which it is charged the oil was taken and severed by respondents.

In this connection it must be observed that the amended indictment alleges that on a specified date the complainant was the owner and holder and in possession of the sole and exclusive right to drill for, produce, extract, and take petroleum oil from certain described land in Kern county, and that it was then and there in the sole and exclusive possession of the land for the purpose of drilling for and producing and extracting therefrom such oil, and that it was the owner and in possession of all oil in the land, and that such oil was a part of the land, that at such time the complainant was producing oil from the land, that on the date specified the respondents, against the will and without the consent of complainant, willfully, unlawfully, and feloniously entered upon the land, converted a certain manner of the realty consisting of a specified number of barrels of oil having a value of $572.28 into personal property by severing such oil from the realty with the felonious intent to sever the same, and that they did sever from the land and steal, take, and carry away the oil.

It is our conclusion that the amended indictment is not subject to the objection thus presented by the respondents. The pleading clearly alleges the felonious taking of certain property which was owned by complainant. Whether the complainant actually owned the oil at the time of taking, or whether it was merely in possession of the land of which the oil formed a part, with the right to drill for and extract the oil, is a matter of indifference so far as this case is concerned. It is an essential element of the crime of larceny that the thing which is taken and carried away shall be the property of another. 18 Am. & Eng. Encyc. of Law (2d Ed.) p. 498. But the exact status of the legal title to the property need not be meticulously alleged in the pleading which charges the commission of the offense. "Considered as an element of larceny, 'ownership' and 'possession' may be regarded as synonymous terms; for one who has the right of possession as against the thief is, so far as the latter is concerned, the owner." People v. Edwards, 72 Cal. App. 102, 116, 236 P. 944, 950. It is, after all, a matter of no concern to a thief that legal title to the stolen property is not in the complainant. People v. Edwards, supra. It is essential that the pleading which charges the commission of the crime of larceny shall contain an averment that the property which is the subject of the offense is not the property of the defendant. People v. Nunley, 142 Cal. 105, 75 P. 676; People v. Mills B. Sing, 42 Cal. App. 385, 395, 183 P. 865. "Possession alone, as against the wrongdoer, is a sufficient interest to justify an allegation and proof of ownership in a prosecution for larceny." People v. Kirsch, 204 Cal. 599, 602, 269 P. 447, 449.

We think that no useful purpose will be here served by indulging in an extended analysis of the exact legal status of crude oil in place. Whether, by reason of its fugitive and migratory character, the owner of the land has merely a qualified ownership or a potential ownership in the oil, or whether his right is something less and may more properly be described as potential possession, is of slight consequence here. It appears to be settled in this state that a lessee under an oil and gas lease acquires no title to the oil and gas in place as part of the realty. Western Oil, etc., Co. v. Venago Oil Corp., 218 Cal. 733, 738, 24 P.(2d) 971, 88 A. L. R. 1271. Nevertheless, the last-cited case holds that such a lessee has the right to enter upon the leased land, drill wells, and reduce the oil and gas to possession, and that such right is sufficient under the doctrine of potential possession to accomplish a valid transfer in præsenti of a fractional interest in the oil and gas in place and not yet captured and reduced to actual possession. If, under the rule announced in this decision, a lessee of land, having the right to drill for and reduce to possession oil in the ground, has such a title to the oil in place that he can sell and transfer it, and the transfer becomes immediately effective, no good reason is apparent why the right conferred upon him by the lease is not such that he is entitled to complain when a trespasser enters upon the leased premises and severs from the realty the very thing which is the real subject of the lease. In Bartholomae Oil Corp. v. Delaney, 112 Cal. App. 314, 296 P. 690, it was decided that the lessee of land under a lease which gave such lessee the exclusive right to drill, develop, and remove petroleum from the ground may maintain an action to quiet title to the leasehold interest and to the oil in place. In Mexican Gulf Oil Co. v. Compania Trans. D. P., S. A. (D. C.) 281 F. 148, 164 the plaintiff sought to recover damages from the defendant for the taking of 6,000,000 barrels of oil from certain land in Mexico upon which the plaintiff claimed to have an exclusive right to drill for oil. The plaintiff was given judgment for the value of the oil taken. Certain language in the opinion bearing upon the question of the ownership of the oil in place is apropos to the problem which is being here considered. The court said: "The argument of the defendant is that oil being a fugacious element is not owned by any one until it is brought to the surface; the owner of the land does not own it if he has given the exclusive right to explore to another; that other cannot recover if he was not in possession of it. Such a result seems to me so unjust as to make the reasoning which leads to it wrong."

Numerous additional authorities have been cited by appellant, wherein the courts have discussed the nature of the right to oil in place which is vested in the owner of the realty. Whether this right is properly characterized as a "qualified ownership" or "potential ownership" or "ownership subject to defeasance" or "potential possession" is not here a matter of very great importance. It must, we think, be granted that it is a right which deserves the protection of the law in its enforcement. It is here conceded that the complainant is the lessee of the land having the exclusive right to drill for, produce, extract, and take from the land crude oil which may be there discovered. This is sufficient to place the complainant in possession of whatever rights to the oil in place as were held by the owner of the leased premises and to entitle the lessee to complain of the unauthorized invasion of such rights by respondents who are alleged to have trespassed upon the land and to have feloniously severed and taken the oil from the realty.

[6] In conclusion, it should be remarked that we have here considered the contention of respondents that oil in place in the ground forms a part of the realty, and that, in accordance with the common-law rule, it may not be the subject of larceny, and have indicated our opinion that this contention is not sustainable because of the presence in the statutes of California of certain laws which have relaxed the rigidity of the common-law rule. Concededly, if oil in place may properly be regarded as personal property rather than realty, the contention of respondents in this regard must fail if the amended indictment is sufficient to charge a larceny of personalty. Examination of the pleading warrants the conclusion that it is entirely sufficient to charge a larceny of personal property, so that, whether the article alleged to have been taken was realty or personalty, the action of the trial court in sustaining the general demurrer of respondents was, in our view, erroneous.

For the reasons herein stated, the order from which this appeal has been taken is reversed, the cause is remanded, and the trial court is ordered to overrule the demurrer to the amended indictment.

We concur: BARNARD, P. J.; MARKS, J.

2 Cal.App.2d 348

SHELL OIL CO. et al. v. SUPERIOR COURT IN AND FOR SONOMA COUNTY et al.

Civ. 5243.

District Court of Appeal, Third District, California.

Nov. 20, 1934.

1. Prohibition 🔑10(2)

Prohibition is proper remedy to prevent superior court from exceeding its jurisdiction by trying libel actions in absence of adequate bond securing defendants' costs, when timely motions for filing of such bond have been presented to court and denied (Gen. Laws 1931, Act 4317, §§ 5, 6; Code Civ. Proc. §§ 1036, 1037).

2. Costs 🔑137

Filing of adequate cost bond is not necessary to vest trial court with jurisdiction of libel action in first instance, and defendant may waive filing of bond, but, where defendant moves to require plaintiff to give adequate bond, proceeding without requiring adequate bond exceeds jurisdiction of court (Gen. Laws 1931, Act 4317, §§ 5, 6; Code Civ. Proc. §§ 1036, 1037).

3. Costs 🔑137

Under statute providing that libel actions should be dismissed where plaintiff did not furnish adequate cost bond, plaintiff could not complain that actions were suspended until bond was filed (Gen. Laws 1931, Act 4317, §§ 5, 6; Code Civ. Proc. §§ 1036, 1037).

4. Costs ⚷109(1)

Where seven separate libel actions brought against five defendants were consolidated for trial, each plaintiff was required to furnish cost bond of $500 or all plaintiffs a bond of $3,500 creating liability against each individual plaintiff for $500, conditioned for payment of costs on appeal as well as in trial court, and hence $500 cost bond for all plaintiffs which failed to provide for costs accruing on appeal was insufficient (Code Civ. Proc. §§ 378, 1036, 1037; Gen. Laws 1931, Act 4317, §§ 5, 6).

5. Costs ⚷136

Defendants in libel actions who failed to demand adequate bond for costs before filing answers did not waive right to object to sufficiency of bond (Gen. Laws 1931, Act 4317, §§ 5, 6; Code Civ. Proc. §§ 1014, 1036, 1037).

◆

Petition by the Shell Oil Company and others against the Superior Court of the State of California in and for the County of Sonoma, and the Honorable Hilliard Comstock as Judge of Department 2 thereof, for a writ of prohibition prohibiting the respondents from trying and determining certain libel actions until the plaintiffs therein first filed adequate bond for costs.

Writ granted.

McCutchen, Olney, Mannon & Greene, of San Francisco, and Geary & Geary and C. J. Tauzer, and Barrett & McConnell, all of Santa Rosa, for petitioners.

Cowan, Kroyer & Jacobsen, of Santa Rosa, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

In this proceeding for a writ of prohibition, five persons, who are named as defendants in a suit for libel, seek to preclude the superior court of Sonoma county from trying and determining the case until the plaintiffs have first filed therein an adequate bond for costs as required by statute.

The petition alleges that ten former employees of the Shell Oil Company, who were recently discharged by that company, have consolidated their separate suits for libel under the provisions of section 378 of the Code of Civil Procedure, for the purpose of trial. Five defendants are made parties to the suit. While the plaintiffs join in one complaint, their several causes of action are kept separate and each plaintiff asks for a judgment of $25,000 from the defendants as damages sustained as the result of the publication of an alleged libel against each plaintiff. After naming all of the plaintiffs, the complaint charges that "each for himself, and not one for the other," asserts that the defendant Shell Oil Company and its agents conspired with their codefendant Press Democrat Publishing Company to maliciously and wrongfully publish in its newspaper at Santa Rosa a libelous article, which was printed June 16, 1933, stating that the plaintiffs were discharged from their employment with the Shell Oil Company "for serious violation of the company policies"; that they were dismissed as a result of a "shakeup," after conducting "an audit investigation of lubricating oil sales." The newspaper article further stated that "No court action will be taken against any of the men involved." In the innuendo it was charged that the defendants inferred by the language which was employed in the newspaper article that the plaintiffs had been discharged on account of dishonest conduct on their part in transactions performed as employees of the company. The prayer of the complaint then stated that "each plaintiff for himself and not one for the other prays for judgment against the defendants for the sum of $25,000." Prior to issuing the summons in that suit, one bond only for costs was executed by two individuals and filed in the action. The undertaking was limited to a maximum liability of $500. After reciting the title of the court and cause, including the name of each plaintiff and defendant, the bond reads:

"Whereas, each of the above named plaintiffs has commenced or is about to commence an action in the Superior Court, * * * against the defendants above named, * * * and has applied or will apply for the issuance of summons in said action against said defendants:

"Now Therefore, in consideration of the filing of said action and the issuance of said summons, we, Merton J. Smith, * * * and Sydney J. Wall, * * * as sureties, and in consideration of the premises, do jointly and severally undertake in the sum of Five hundred dollars ($500.00) and promise to the effect that if said action be dismissed or defendants recover judgment, that we will pay such costs and charges as may be awarded against the said plaintiffs and in favor of said defendants, not exceeding the said sum of Five Hundred Dollars ($500.00), to which amount we acknowledge ourselves jointly and severally firmly bound by these presents."

Separate answers to the complaint were filed by two different firms of lawyers. One answer was filed in behalf of Shell Oil Company and two of its agents, who were joined as defendants. A separate answer was filed on behalf of the Press Democrat Publishing Company and Vernon Silvershield. The suit was dismissed with respect to three of the plaintiffs. It is still pending with respect to seven of the plaintiffs. After the answers were filed, motions were made on behalf of each defendant to dismiss the action or require the filing of other bonds to furnish the defendants with ample security for their costs against each plaintiff as required by statute. These motions were denied on the theory that the bond is adequate. The cause was then set for trial for December 13, 1934. It is alleged the court will proceed to try the cause without requiring ample statutory bonds to secure the defendants' costs, unless it is prohibited from so doing. To the petition for a writ of prohibition the respondents have demurred.

It is contended the writ of prohibition is not a proper remedy under the circumstances of this case, since the furnishing of a statutory bond to secure the defendants' costs is not jurisdictional; that a writ of prohibition will issue only to prevent an inferior court from acting without, or in excess of, its jurisdiction. It is further asserted the bond which was filed by the plaintiffs is adequate in form and amount to satisfy the statutory requirements. Finally, it is insisted the defendants waived their right to object to the sufficiency of the undertaking by filing their answers without first presenting the motions to dismiss the action or to supply further adequate bonds.

[1-3] The writ of prohibition is the proper remedy to prevent a superior court from trying and determining a libel suit in the absence of an adequate bond securing the defendants' costs as required by statute, when a timely motion for the filing of such bond has been first presented to the court and denied. Carter v. Superior Court, 176 Cal. 752, 757, 169 P. 667, 669. In the case last cited, Carter was sued by a nonresident plaintiff. Upon Carter's motion, which was presented under the provisions of section 1036 of the Code of Civil Procedure, to require the plaintiff to furnish an undertaking to secure defendant's costs, a bond was filed which plaintiff claimed was adequate to fulfill the requirements of the statute. After the lapse of thirty days, Carter moved to dismiss the action for plaintiff's failure to file the bond, under the provisions of section 1037 of the Code of Civil Procedure. The bond was insufficient. The motion to dismiss the cause was denied. The trial court held that the bond was adequate. Upon petition for a writ of prohibition the District Court of Appeal held that the undertaking was insufficient to comply with the statute and thereupon restrained the trial court from proceeding to determine the cause. On subsequent hearing of that proceeding by the Supreme Court, it was also held that the bond was inadequate, and a writ of prohibition was issued by that court restraining the trial court from entertaining further proceedings until an adequate bond was filed therein as required by law, and reserving to Carter the right to move for a dismissal of the action in the event that the bond was not filed within thirty days thereafter. The court said in regard to that proceeding:

"Even if the statute be so construed as to require such filing within the 30 days, there can be no doubt that the trial court, in the exercise of a sound discretion, could permit such filing, and should do so where it appears that a party in good faith has originally endeavored to comply with the statute by filing an undertaking which was defective. This has been expressly held in relation to the bond required in actions for libel and slander to secure the defendant as to costs and charges, where the statute expressly provided that 'an action brought without filing the undertaking shall be dismissed.' The decisions under this act fully sustain our views on the question of jurisdiction and the power of the court on motion for dismissal for failure to file bond. Dixon v. Allen, 69 Cal. 527, 11 P. 179; Stinson v. Carpenter, 78 Cal. 571, 21 P. 304; Becker v. Schmidlin, 153 Cal. 669, 671, 96 P. 280. * * *

"However, it is clear that proceedings in the action should be stayed pending the filing of the required undertaking. This much is expressly provided in section 1036, Code of Civil Procedure, and manifestly is essential to accomplish the object of the statute. Of this provision it was said in Meade County Bank v. Bailey [137 Cal. 447, 70 P. 297], supra: 'The statute vests in the defendant the right to have the bond, and the court cannot against his will deprive him of that right, or alter the amount or terms of the bond required. When the demand for security for costs is made in the proper case, the law itself enjoins further proceedings on the part of the plaintiff until the demand is complied with according to the provisions of the Code.' Will prohibition lie to prevent such further proceedings pending the filing of the undertaking? Where the court refuses to dismiss an action for failure to file the required undertaking, and is proceeding to try the cause without any undertaking being on file, manifestly the defendant has no plain, speedy, and adequate remedy in the ordinary course of law."

While it is not necessary in order to vest jurisdiction in the trial court in the first instance that the plaintiff shall file a bond for costs in a libel suit, and it is true that the defendant may waive that undertaking (Becker v. Schmidlin, 153 Cal. 669, 96 P. 280) after the defendant has duly moved the court to require the furnishing of bonds, it will be deemed to constitute an excess of authority for the court to proceed to try the cause without requiring an adequate undertaking to be first filed. The writ of prohibition is the proper remedy by means of which to restrain the exercise of this excess of authority. The statute provides that "An action brought without filing the undertaking required shall be dismissed." Stat. 1871, p. 533, as amended by Stats. 1880, p. 81; 2 Deering's Gen. Laws of 1931, p. 2160, Act 4317. After authorizing the defendant to move for an order requiring an additional undertaking when the original bond is deemed to be inadequate, section 6 of the act provides that: "If the undertaking as required be not filed in five days after the order therefor, the judge or court shall order the action to be dismissed."

The respondents herein contend that the Carter Case, supra, is not authority for the issuing of a writ of prohibition for failure to file an undertaking in a libel suit, because section 1036 of the Code of Civil Procedure, which requires a nonresident plaintiff to file a bond for costs, specifically provides that: "When required, all proceedings in the action or special proceeding must be stayed until an undertaking * * * is filed with the clerk." It is suggested that no similar provision exists in the statute with relation to a bond for costs in a libel suit. But the statute last mentioned does declare that the suit shall be dismissed if the required bond be not given. This is a more stringent penalty for failure to file the bond. Section 1037 of the Code of Civil Procedure contains a similar provision authorizing the dismissal of an action for failure of a nonresident plaintiff to give a bond for costs within thirty days after notice therefor, or after the court has ordered it to be furnished. The failure to supply an adequate statutory bond for costs, by either a nonresident plaintiff or by a plaintiff in a libel suit, after due notice therefor and after the court has ordered it to be filed, results in creating a situation in which the trial court is required to dismiss the action upon motion therefor. A court may not arbitrarily deny a defendant's motion for the supplying of a cost bond and then proceed to try the case over the defendant's objection thereto. Where a court threatens to try a libel suit without requiring an adequate statutory bond for costs to be filed, upon timely motion therefor, the writ of prohibition is the proper remedy to restrain the court from so doing.

Even though the statute regarding the filing of a cost bond in libel cases does not specifically provide for suspending the trial for failure to file the undertaking, the respondents may not complain because they are afforded the opportunity to file the bond instead of dismissing the action forthwith. As suggested in the Carter Case, supra, where the plaintiff in good faith has filed a bond for costs which, on motion of the defendants, appears to be defective or insufficient, the court should be vested with a discretion to permit the correction of the defect or the substitution of an adequate bond within the time allowed by statute before the case is dismissed. In fact, that is precisely what the statute does contemplate. Section 5 of the act, with relation to bonds for costs in libel suits, provides that, "in case a new or additional undertaking is ordered, all proceedings in the case shall be stayed until such undertaking is executed and filed, with the approval of the judge." And the following section provides that, "if the undertaking as required be not filed in five days after the order therefor, the judge or court shall order the action to be dismissed."

The statute requiring the filing of a bond for costs in a libel suit is to protect those who in good faith are exercising their constitutional guaranty of free speech and freedom of the press against the too common practice of instituting libel and slander suits inspired by mere spite or ill will and without good faith. The act has been held to be constitutional. Smith v. McDermott, 93 Cal. 421, 29 P. 34. We are of the opinion that, where no bond has been filed, or where an insufficient bond has been filed, after timely motion of the defendant to supply the necessary bond has been made, the court is without authority to refuse the application or to proceed with the trial in its absence. Under such circumstances prohibition is the proper remedy to prevent the exercise of an excess of jurisdiction.

[4] We are convinced the bond which was filed in this case is inadequate with respect to both the amount and the form of the undertaking. In effect this suit consists of seven separate causes of action on behalf of seven separate plaintiffs, each of which depends in part upon different proof to establish the damages which are independently sought by each complainant. The plaintiffs held different positions with the Shell Oil Company in different localities. These separate cases were consolidated for convenience in the trial thereof, under the provisions of section 378 of the Code of Civil Procedure. A separate judgment is demanded in favor of each plaintiff. In reality the case consists of seven separate actions by different plaintiffs which have been consolidated in the interest of economy of time and expense. Colla v. Carmichael U-Drive Autos, Inc., 111 Cal. App. (Supp.) 784, 294 P. 378. The respondents really concede that fact. The spirit of the statute therefore requires that each plaintiff shall file a statutory bond of $500 to cover the defendants' costs in case the action is dismissed as to any plaintiff or in the event the defendants recover judgment against any one of the plaintiffs for "such costs and charges as may be awarded against the plaintiff by judgment or in the process of the action, or on an appeal." We are, however, of the opinion that, in lieu of a separate $500 bond on the part of each plaintiff, it would be sufficient if one bond were filed for a sum equivalent to seven times the statutory amount of $500 which is required by law of each plaintiff who maintains a separate cause of action, provided the form of the undertaking otherwise complies with the statute and clearly creates a liability against the sureties for costs against each individual plaintiff in the sum of $500. This liability is not created by the terms of the present bond. The sureties are therein limited to a total liability of "not exceeding said sum of Five Hundred Dollars." Moreover, the bond makes no provision for the payment of any costs "on an appeal" from any judgment which may be rendered. The bond is clearly deficient in that regard. The language of the bond fixes an absolute limitation of liability in the sum of $500 in the aggregate, and fails to provide for costs which may accrue on appeal. It has been definitely held that the court has no power to fix a sum for a cost bond less than the statutory amount required nor to change the amount or consideration of the undertaking fixed by statute. Meade County Bank v. Bailey, 137 Cal. 447, 70 P. 297; 7 Cal. Jur., p. 274, § 14. In the Meade Case last cited it is said in that regard: "The amount as well as the condition of the bond is prescribed by the Code, and the court has nothing to do with fixing the same. The statute vests in the defendant the right to have the bond, and the court cannot, against his will, deprive him of that right, or alter the amount or terms of the bond required."

A surety may not be held beyond the express terms of his bond, and, if the contract prescribes a penalty for its breach, he cannot, in any event, become liable for more than the stated penalty. Carter v. Superior Court, 176 Cal. 752, 755, 169 P. 667; section 2836, Civ. Code. The justice of the above construction of the statute requiring each plaintiff who maintains a separate cause of action for libel, whether his case be prosecuted separately or in consolidation with other similar cases, to file a statutory bond of $500 to cover costs, is illustrated by the circumstances of this case. Ten different plaintiffs combined to file their separate causes of action in one complaint against five different named defendants, together with other fictitious defendants. The suits affecting three of the plaintiffs have been dismissed. It does not appear whether the suits of these three plaintiffs were brought in good faith or not. If they were dismissed before the defendants appeared in the action, it may be true that the defendants have no recourse for reimbursement for whatever costs they may have incurred on that account. Seven plaintiffs still remain in the suit with their separate causes of action. One of the items of costs to which each separate defendant is entitled, in the event of a dismissal of his suit by any one plaintiff, or upon the recovery of judgment by any defendant, is the statutory sum of $100, in lieu of attorney's fees, for each of such defendants. Ream v. Barr, 108 Cal. App. 172, 291 P. 451; Irwin v. Newby, 102 Cal. App. 110, 282 P. 810, 283 P. 370; Hills v. Shaffer, 96 Cal. App. 520, 274 P. 388; Gloria v. A. Colonia Portuguesa, 114 Cal. App. 268, 299 P. 807. In the case last cited a hearing was denied by the Supreme Court. It follows that in this case at least five defendants may be entitled to attorney's fees in the sum of $100 each against any one plaintiff whose suit may be dismissed, or against whom a judgment may be recovered. It will be observed that, if all of the defendants finally recover judgment against any one of the plaintiffs, the bond on file is inadequate to cover more than that one item of counsel fees. It leaves nothing for other costs which may be incurred. To hold that the present bond is sufficient destroys the very spirit and purpose of the statute. We conclude that the bond on file is inadequate with respect to both the amount thereof and the form of the undertaking.

[5] The defendants did not waive their right to object to the sufficiency of the undertaking merely because they failed to demand an adequate bond for costs before they filed their answers. Wall v. Hunter, 57 Cal. App. 759, 207 P. 934. In the case last cited, the defendant filed a general demurrer and answer in a suit which was commenced against him by a nonresident of the state. After filing these pleadings, the defendant for the first time moved the court to require the plaintiff to furnish a bond to secure his costs under the provisions of section 1036 of the Code of Civil Procedure. The motion was granted. For failure to file the bond within the time allowed therefor, the cause was subsequently dismissed. Upon petition for a writ of certiorari, the court held that the defendant had not waived his right to demand the bond as security for his costs, by first appearing and filing a demurrer and answer. The court said:

"The points urged by appellant are (1) that the defendant Wall, having answered the complaint by filing a general demurrer and afterward an answer thereto, waived his right to make a demand for security for costs. * * *

"As to points 1 and 3, it is sufficient to refer to the statute, sections 1036 and 1037 of the Code of Civil Procedure. These sections do not require that the demand for costs be filed or that it be made and served upon the plaintiff before demurrer or answer."

This language is applicable to the statute which is involved in this case. It does not state when the application for such a bond, or the demand for the increase thereof, shall be made. It is not too late to make such a motion after the defendant has appeared and answered the complaint, or at any reasonable time before the trial of the case.

It is true that, when a defendant makes a general appearance in a case pursuant to the provisions of section 1014 of the Code of Civil Procedure, he thereby waives any defect of process and confers jurisdiction of his person upon the court. 4 C. J. p. 1354, § 44. That principle is not involved in this case. The court had original jurisdiction in this case independently of the defective bond for costs which was filed. The filing of a statutory bond for costs in a libel suit is not necessary in order to confer jurisdiction of the cause upon the court. Dixon v. Allen, 69 Cal. 527, 11 P. 179; Carter v. Superior Court, 176 Cal. 752, 169 P. 667; Creditors v. Consumer's Lumber Co., 98 Cal. 318, 33 P. 196; Becker v. Schmidlin, 153 Cal. 669, 96 P. 280. In the case last cited the court says in that regard: "The jurisdiction of the court in an action for slander does not depend upon whether a sufficient undertaking is or is not filed at the time the suit is commenced. It has such jurisdiction even when no undertaking at all is filed, and may permit one to be filed subsequent to the commencement of the action, and, of course, may permit a new undertaking to be filed in lieu of a defective one."

In other jurisdictions the courts have held that a defendant waives his right to request a bond for costs in a libel suit by making a general appearance in the case without first demanding the undertaking. But that is not the rule in this state. The Dixon Case, supra, does hold that a court has the discretion to deny a motion to dismiss the action for failure to file the bond when the motion was made after a stipulation was granted permitting the plaintiff to file an amended complaint, after the defendant had agreed to the setting of the case for trial and when the bond was actually on file before the motion to dismiss the cause was presented. The reason for the California rule is that the filing of the bond in the first instance is not jurisdictional, and there is nothing in the statute that indicates the intention to declare a waiver of the bond on the part of the defendant for failure to make the demand therefor before making a general appearance in the case. In the case of Stinson v. Carpenter, 78 Cal. 571, 21 P. 304, upon which the respondents in this case rely, the Supreme Court did say: "Passing the question whether defendant had not waived any rights [to demand a cost bond] which he might have had in the premises," by first filing his answer, "we think that the main question has been settled against him." In that case, however, the bond was not filed until several days after the summons was issued. But it was on file when the motion to dismiss the action was made after the jury was in attendance for the purpose of the trial. The court did not hold that the defendant waived his right to make the motion to dismiss the action because it was not presented until after his answer was filed. The language above quoted may not be so construed. The court merely passed that question without pretending to determine it. The case is not in point.

The writ of prohibition should issue in the present proceeding, not for the reason that there was an original lack of jurisdiction of the causes, but because there is a threatened excess of authority in proceeding to try the case in spite of the motion which was made, without first requiring the plaintiffs to file adequate bonds as required by the statute.

The writ of prohibition is granted restraining the court from proceeding to try the causes until adequate bonds for costs of each defendant have been filed for the amounts and in the form hereinbefore suggested, with the privilege accorded the defendants to subsequently move to dismiss the cause if the plaintiffs or any of them fail to file such bonds after the order therefor is made, and within the time allowed by statute.

We concur: PULLEN, P. J.; PLUMMER, J.

2 Cal.App.2d 360

JOERGER v. SUPERIOR COURT IN AND FOR SHASTA COUNTY et al.

Civ. 5245.

District Court of Appeal, Third District, California.

Nov. 20, 1934.

Hearing Denied by Supreme Court Jan. 17, 1935.

1. Prohibition 🔑24

District Court of Appeal has power to recall and quash alternative writ of prohibition which has been inadvertently issued upon misapprehension of facts involved (Code Civ. Proc. §§ 128 (8), 937).

2. Prohibition 🔑24

In proceedings for prohibition to restrain trial of ejectment suit pending report on defendant's petition in bankruptcy, that federal court had vacated order restraining ejectment trial could be raised by motion to recall and quash alternative writ as well as by demurrer (Code Civ. Proc. §§ 128 (8), 937).

3. Bankruptcy 🔑212

Superior court had jurisdiction to try ejectment suit pending determination on defendant's petition in bankruptcy, where property was bought at foreclosure sale and suit was commenced more than 14 months before filing of petition in bankruptcy, and federal court vacated order restraining trial.

Proceedings by Louis P. Joerger against the Superior Court of the State of California, in and for the County of Shasta, and another, for a writ of prohibition to restrain respondents from proceeding to try an ejectment suit. On motion to quash the alternative writ.

Alternative writ recalled and quashed, and petition denied.

Jesse W. Carter, of Redding (Dallas L. Barrett, of Redding, of counsel), for petitioner.

Louis Ferrari, C. H. White, and W. E. Johnson, all of San Francisco, and W. T. Belieu, of Willows, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is a motion on the part of the respondents herein to quash an alternative writ of prohibition which was previously issued by this court to restrain the superior court of Shasta county from proceeding to try an ejectment suit which is pending in that court wherein Bank of America National Trust & Savings Association is plaintiff, and Louis P. Joerger and wife and Elmer H. Joerger and wife are defendants, involving the right of possession of certain real property which was formerly sold to the Bank of America on foreclosure of a trust deed. The motion to quash is based upon the insufficiency of the petition for a writ of prohibition to warrant the issuing of the alternative writ.

The only facts necessary for a determination of this motion to quash appear as follows: To secure a loan of $60,446.22, Louis P. Joerger and wife, on May 27, 1925, executed a trust deed on the tract of land in Shasta county which is involved in this controversy, to J. E. Huntoon and S. E. Pope, as trustees for the benefit of Bank of America National Trust & Savings Association. The note representing that secured debt matured in May, 1928. The trust deed was foreclosed, and by virtue thereof the Bank of America National Trust & Savings Association claims to have become the owner and entitled to the possession of the real property which the grantors still continue to hold and occupy. The suit to eject Louis P. Joerger and wife from the property was commenced in February, 1933, in Shasta county. That case was set for trial in March, 1934, but it was continued for trial to September 11, 1934. In the meantime, on August 10, 1934, Louis P. Joerger voluntarily filed his petition in the United States District Court for the Northern District of California to be adjudged a bankrupt. His schedule of assets and liabilities included a claim of title to the land which was sold on foreclosure of the trust deed, on the theory that there was some error in the foreclosure proceedings. On the last-mentioned date, on which the petition in bankruptcy was filed, the United States District Court made an order restraining the superior court from proceeding to try the case in ejectment. Subsequently, on application therefor, all parties being represented by respective counsel, the United States District Court made its order vacating the last-mentioned restraining order and authorizing the superior court of Shasta county to proceed with the trial of the ejectment suit. The last-mentioned order reads in part: "It is ordered that the restraining order made herein on the 10th day of August, 1934, * * * is hereby vacated and set aside, and said Superior Court is hereby authorized to proceed with the trial of said action."

Thereupon the ejectment suit was again set for trial for September 25, 1934. On September 20, 1934, Louis P. Joerger filed his petition in this court for a writ of prohibition, claiming that he is the owner and entitled to the possession of the real property above referred to; that he had filed a voluntary petition in bankruptcy including that property in his schedule of assets, and praying for a writ of prohibition to restrain the superior court of Shasta county from proceeding with the trial of the ejectment suit until the conciliation commissioner of the United States District Court determines and reports upon his petition in bankruptcy. The petition for the writ of prohibition fails to include any reference to the order of the United States District Court authorizing the superior court of Shasta county to try the ejectment case. The attention of this court was not called to the existence of that order. Upon the theory that the United States District Court had assumed and was retaining jurisdiction of all proceedings involving the title and right of possession of the real property which is involved herein, this court inadvertently issued an alternative writ of prohibition in this proceeding. October 12, 1934, the respondents herein moved to quash that alternative writ and deny the petition for a writ of prohibition on the ground that the petition is without merit and this court is not authorized to issue the writ under the circumstances of this case.

[1, 2] The petitioner contends that this court has no power to recall the alternative writ of prohibition which was issued in this case for the reason that no demurrer to the sufficiency of the petition was filed, and that the alleged defect of the petition may not be raised by a motion to recall and quash the alternative writ.

While it is true that the insufficiency of the allegations of a petition for a writ of prohibition may be raised by demurrer thereto, we are of the opinion this court has statutory authority or even inherent power to recall and quash an alternative writ which has been inadvertently issued upon a misapprehension of the facts involved therein. In the present proceedings the defect of pleading complained of by the respondents does not appear in the petition. The fact that the United States District Court first restrained the superior court of Shasta county from proceeding to try the ejectment case, and subsequently vacated and set that order aside and specifically authorized the state court to proceed with the ejectment trial, does not appear in the petition, and this court had no knowledge of those facts when the alternative writ was issued. Section 128 of the Code of Civil Procedure authorizes a court "8. To amend and control its process and orders so as to make them conformable to law and justice." Section 937 of the same Code provides that: "An order made out of court, without notice to the adverse party, may be vacated or modified, without notice, by the judge who made it; or may be vacated or modified on notice, *in the manner in which other motions are made.*" The alternative writ was issued in this proceeding on an ex parte application of the petitioner without notice to the respondents. This motion to recall and quash the alternative writ was formally made upon notice to the petitioner and in the presence of his counsel. A motion to recall and quash an alternative writ in a special proceeding under circumstances similar to those which exist in the present case is recognized as proper. 50 C. J. p. 705, § 127; 21 Standard Enc. of Proc. p. 822, § 2H; High's Extraordinary Legal Remedies (3d Ed.) p. 487, § 521. In the authority last cited, it is said: "Since the issuing of an alternative mandamus upon an ex parte application is not at all conclusive upon the real merits of the controversy or the sufficiency of the application, it follows that the respondent should be allowed an opportunity of testing the sufficiency of the alternative writ, or of the application therefor, before being compelled to make return. Such an opportunity is usually afforded by a motion to quash the alternative mandamus, which may be grounded either upon defects in substance or in form. The motion to quash in mandamus cases performs the functions of a demurrer to a declaration in an ordinary action at common law, and it is regarded as the appropriate means of testing the sufficiency of the application."

The language of the preceding text is equally applicable to alternative writs of prohibition. The motion to quash the alternative writ served the same purpose under the circumstances of this case that a demurrer would afford.

[3] The filing of petitioner's proceeding in bankruptcy on August 10, 1934, did not oust the superior court of Shasta county of jurisdiction to try and determine the rights of the litigants in the possessory action of ejectment which was pending in that court for more than a year prior to the filing of Joerger's petition in bankruptcy. The trust deed to the real property which is involved herein, which deed secured the promissory note representing the debt due from Joerger to the Bank of America National Trust & Savings Association, matured in May, 1928, and was thereafter foreclosed. The trustees conveyed the land to the beneficiary according to the terms of the deed. Thereafter the suit for ejectment was commenced in February, 1933. The voluntary petition of Joerger to be adjudicated a bankrupt was not commenced until more than fourteen months thereafter. The trustee of the bankrupt has never sought to intervene in the ejectment suit. The United States District Court has specifically authorized the superior court of Shasta county to proceed with the trial of the ejectment case. There is no conflict of jurisdiction between the federal court and the state court. In the case of In re Winter (D. C. Mich.) 17 F.(2d) 153, 154, it was held that a suit for the possession of land was not stayed by the subsequent filing of a petition in bankruptcy by the defendant. In that case the bankrupt defaulted in the terms of a written contract to purchase real property. The contract provided for immediate possession by the owner upon default of the vendee and notice thereof by the vendor. This notice of default and demand for possession of the property was given. While that suit was pending the vendee filed his petition in bankruptcy. Judgment for possession of the property was subsequently recovered by the owner of the land. In summary proceedings before the referee in bankruptcy, that officer held that the judgment and proceedings in the possessory action in the state court were void. The District Court reversed that order and held that the state court had jurisdiction to render a valid judgment in that case notwithstanding the adjudication of bankruptcy of the vendee of the land within four months of the time when the action was commenced. The court said in that regard:

"It is, of course, elementary that the custody of property of a bankrupt which a court of bankruptcy obtains, and the title to such property which a trustee in bankruptcy acquires, are subject to whatever rights in, and claims against, such property are held by other persons at the time of the filing of the petition in bankruptcy by or against such bankrupt, except in so far as such rights or claims are void or voidable under the express provisions of the Bankruptcy Act [11 USCA]. To the extent indicated, the trustee stands in the shoes of his bankrupt with respect to the title of property so involved.

"It is also settled law that where a court, federal or state, has properly acquired jurisdiction in a suit brought against a person to enforce an adverse claim of lien on, or title to, certain land, and after such court has acquired such jurisdiction in such suit a petition in bankruptcy is filed by or against such person, but such aforementioned suit is not stayed by the bankruptcy court, and no officer thereof seeks to intervene in such suit, a judgment thereafter rendered therein will be recognized by the bankruptcy court as valid and binding."

It follows that the superior court of Shasta county has jurisdiction to try and determine the ejectment suit which is involved in this proceeding, particularly since the United States District Court has affirmatively authorized the state court to proceed. Unless the superior court lacks jurisdiction or proceeds to act in excess of its authority, this court should not interfere with the trial of the ejectment suit.

The alternative writ of prohibition is therefore recalled and quashed, and the petition for a writ of prohibition is denied.

We concur: PULLEN, P. J.; PLUMMER, J.

2 Cal.App.2d 392

MARKHAM v. HANCOCK OIL CO. et al.

Civ. 1510.

District Court of Appeal, Fourth District, California.

Nov. 24, 1934.

Hearing Denied by Supreme Court Jan. 21, 1935.

1. Appeal and error ⇨933(4)

Where new trial motion was made on all statutory grounds, but order granting motion did not state that it was granted for insufficiency of evidence, it must be presumed on appeal that order was not made on such ground (Code Civ. Proc. § 657).

2. Negligence ⇨80

Any negligence of plaintiff contributing even in slight degree to accident is "contributory negligence" which will bar recovery.

[Ed. Note.—For other definitions of "Contributory Negligence," see Words & Phrases.]

3. Automobiles ⇨246(9)

In action against driver and owner of truck which was struck by plaintiff's automobile as truck was making left turn at intersection on three-lane highway, instruction that if truck driver approached point of turning and drove truck over center line, such fact in itself was negligence of defendants *held* erroneous in form (St. 1929, p. 541, § 129 (a); St. 1931, p. 2125, § 123 (c).

4. New trial ⇨35, 39

In action for intersectional collision, where court erred in instructions as to defendant truck driver's rights and duties in making left turn on three-lane highways and in admitting as binding on defendant employer evidence admissible as against defendant driver, granting of new trial *held* not abuse of discretion (St. 1929, p. 541, § 129 (a); St. 1931, pp. 2125, 2126, §§ 123 (c), 131 (b); Const. art. 6, § 4½).

◆

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Arthur G. Markham against the Hancock Oil Company of California, the Alameda Oil Company, Inc., and another, in which second-named defendant filed a cross-complaint against plaintiff. Verdict for plaintiff, and from an order granting defendants' motion for a new trial, plaintiff appeals.

Affirmed.

Emmett A. Tompkins, of Los Angeles, for appellant.

Swing & Swing, of San Bernardino, for respondents.

BARNARD, Presiding Justice.

The appellant was injured in a collision between an automobile driven by him and a combination truck and trailer owned by the respondent Alameda Oil Company and driven by the respondent Bunch, which occurred about 11 o'clock on the night of January 14, 1933. The respondent Bunch was driving the truck easterly on Foothill boulevard, a state highway, which is divided and clearly marked into three traffic lanes. Intending to turn north on a side street and when 150 feet from the intersection, he put up a mechanical signal indicating a left-hand turn and pulled into the center lane. When he reached the intersection, he stopped to permit other cars to pass. He testified that at this time he observed the appellant's car approaching from the east, and then some 600 feet away. While making the turn at a low rate of speed and after the entire truck had passed to the north of the paved portion of the highway, with the front end and the cab thereof entirely north of the intersection proper, the truck was struck on its right side and just to the rear of its cab by the car driven by the appellant.

[1] In this action, which followed, a jury returned a verdict in favor of the appellant for $3,000. The respondents' motion for a new trial was granted and from that order this appeal is taken. While the motion was made upon all of the statutory grounds (Code Civ. Proc. § 657), the order appealed from did not state that it was granted upon the ground of insufficiency of the evidence and it must, therefore, be presumed that the same was not made upon that ground. Phillips v. Powell, 210 Cal. 39, 290 P. 441; Baroni v. Rosenberg, 209 Cal. 4, 284 P. 1111. In support of the order, the respondents contend that several instructions were erroneously given and that certain evidence was improperly admitted.

One instruction given, based upon subdivision (b) of section 131 of the California Vehicle Act (St. 1923, p. 560, as amended by St. 1931, p. 2126), included the following: "I therefore instruct you, that if you find that the automobile in which the plaintiff was driving was so close to the intersection as to constitute a hazard at the time involved here * * * it was the duty of the driver of said defendant's truck to have yielded the right of way, and a failure, if any, on his part was negligence as a matter of law. * * *"

The word "immediate" which precedes the word "hazard" in the statutory provision was here omitted. The appellant contends that this error was cured by other instructions on the same subject, in which the word "hazard" was preceded by the word "immediate." The instructions were at least conflicting and certain evidence, which need not be here set forth, is such as to indicate that the error in the instruction first referred to may well have been prejudicial in the extreme.

[2] In another instruction, with reference to the defense of contributory negligence, the jury was told that it "should disregard said plea, even if you find that the plaintiff was guilty of contributory negligence, unless such negligence, if any, was a proximate cause of the injuries, if any, to plaintiff." It is well settled that any negligence on the part of a plaintiff which contributes even in a slight degree to an accident, is contributory negligence which will bar a recovery.

[3] Another instruction, after quoting the second paragraph of subdivision (a) of section 129 of the California Vehicle Act (St. 1923, p. 558, as amended by St. 1929, p. 541), told the jury that if the driver of this truck "approached the point of turning and drove said truck over the center line," that fact, in itself, constituted negligence on the part of the defendants. Under subdivision (c) of section 123 of the California Vehicle Act (St. 1923, p. 557, as amended by St. 1931, p. 2125), a driver was permitted, in preparing for a left turn, to drive in the center lane of a highway which is divided into three lanes. The uncontradicted evidence shows that such a situation existed here at the time in question and that the truck, being in the center lane in preparation for a left turn, was partly across the center line of the highway. Under the circumstances and in the form in which it was given, this instruction was erroneous.

It also appears that certain evidence which was admissible as against the driver of the truck was admitted as also binding upon his employer. Any effect which this might have would, of course, be confined to that portion of the order which affects the respondent employer.

[4] In view of the errors referred to, the granting of the order appealed from cannot be held to have been an abuse of discretion, especially in view of section 4½ of article 6 of the Constitution. As was said in Dodds v. Gifford, 127 Cal. App. 629, 16 P.(2d) 279, 282:

"Since these instructions were erroneous and prejudicial, it was the duty of the court to grant a new trial if the judge was satisfied they resulted in a miscarriage of justice. The question as to whether instructions are erroneous is a pure problem of law. The question as to whether erroneous instructions result in a miscarriage of justice depends upon their application to the facts of the particular case as they are disclosed by the record. In determining whether erroneous instructions result in a miscarriage of justice, the trial court is invested with a reasonable discretion. Section 4½ of article 6 of the Constitution provides that a new trial shall not be granted on account of misdirection of the jury, 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' The granting of a new trial for the giving of erroneous instructions necessarily infers that the trial court in the exercise of its discretion determined that these instructions did result in a miscarriage of justice."

The order appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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SECOND SERIES

CARLON v. J. G. RUDDLE PROPERTIES, Inc., et al.

S. F. 15162.

Supreme Court of California.
Nov. 28, 1934.

Rehearing Denied Dec. 20, 1934.

1. Mortgages ⇐473

Junior mortgagee procuring appointment of receiver in foreclosure action had special lien, subject to rights of mortgagor, free of right of senior mortgagee with deficiency judgment, to rents and profits accumulated in receiver's hands prior to sale under senior mortgage, where senior mortgagee sought no relief in junior mortgagee's foreclosure action with respect to receivership, and subsequently brought independent foreclosure suit (Code Civ. Proc. § 564, subd. 2, as amended by 1933, p. 1867).

2. Certiorari ⇐5(1)

Summary order whereby court in junior mortgagee's foreclosure action attempted to award funds in receiver's hands to senior mortgagee having no interest therein can be annulled upon certiorari.

In Bank.

Petition by T. H. Carlon, opposed by the J. G. Ruddle Properties, Inc., and others, to review an order awarding to the respondent Security First National Bank of Los Angeles certain funds in the hands of a receiver appointed in a mortgage foreclosure action.

Petition sustained, and order annulled.

Rehearing denied; LANGDON, J., dissenting.

James F. Peck, of San Francisco, for petitioner.

F. M. Ostrander, of Merced, for respondents.

PRESTON, Justice.

Petition for certiorari. Two questions are presented by this record—one of substantive right and the other of procedure.

The first is the right of petitioner, as junior mortgagee of certain property, to the rents, issues, and profits thereof, in the hands of a receiver appointed at his request in a foreclosure proceeding begun by him, to which the senior mortgagee was made a party, but stood indifferent at the time said receiver was appointed, taking no step there or thereafter to have the receivership inure to its benefit.

The second is the propriety of the writ of certiorari to annul an order made in said proceeding awarding these funds to the senior mortgagee, who in the meantime had instituted an independent foreclosure proceeding, conducted a sale thereunder, and obtained a deficiency judgment, which remains unsatisfied.

The facts are: Petitioner instituted in the superior court of the county of Merced, on March 22, 1926, an action against the Ruddle Properties, Inc., to foreclose a junior mortgage in the sum of $23,086.54. The respondent Security First National Bank of Los Angeles, a corporation, in the name of its predecessor, was named as a defendant and answered asserting the priority of its mortgage, but asking no further relief. The court, on application of petitioner, appointed a receiver for the rents, issues, and profits of the mortgaged property. The bank neither assented to nor protested against this action, and it took no steps to have the receivership cover a prospective lack of security as to it.

The receiver took possession of said property and continued in possession thereof until a few weeks subsequent to January 17, 1931, during which time he accumulated and had on hand the sum of $14,320.30. But following the action instituted by petitioner, respondent bank, on July 30, 1926, instituted against the mortgagor an independent action to foreclose its first mortgage, making petitioner a party thereto, but not asking for a receivership or for any relief against the receivership which had theretofore existed. This action was pursued to judgment; the amount of the claim of respondent bank was fixed, together with the amount of petitioner's claim as junior mortgagee.

Thereafter, and on said January 17, 1931, the property was sold at foreclosure sale under proceedings in said action of the senior mortgagee, and, the property failing to bring the amount of its claim, a deficiency judgment in the sum of $178,744.38 was entered against said mortgagor. Following the sale the receiver surrendered possession of the property, but retained and still retains said above-mentioned funds in his hands. However, he was discharged as such receiver on February 10, 1932.

Thereafter, and on September 27, 1933, the respondent bank moved the court in the action begun by petitioner for an order requiring the receiver to pay all said moneys and turn over all property remaining in his hands to it. Said motion was made upon the ground that said bank was entitled to the distribution to it of all funds and money remaining in the hands of said receiver, and it was heard upon the records in said cause and also upon the records in the cause instituted by said bank for foreclosure of its mortgage. It was resisted by petitioner, who filed the supporting affidavit of James F. Peck.

Thereafter, and on April 3, 1934, the court in said action settled the account of said receiver and found that he had on hand in cash said sum of $14,320.30, together with certain personal property not necessary to here describe. On the same day the court gave a second order requiring said receiver to turn over said money and said personal property to respondent bank, together with interest on said sum from and after the date of the order. It is the validity of this last-mentioned order that petitioner here questions by this proceeding for certiorari. Respondent, however, contends, not only that the order is valid and binding, but that it may not be reviewed in any other manner than by appeal.

[1] The rule of law applicable to such a state of facts has had the attention of text-writers and the courts of other jurisdictions. While there is some apparent conflict in the holdings, upon examination it seems to be more apparent than real.

For example, Mr. Wiltsie on Mortgage Foreclosure (4th Ed.) vol. 1, § 580, pp. 751, 752, citing Miltenberger v. Logansport, C. & S. W. R. Co., 106 U. S. (16 Otto) 286, 1 S. Ct. 140, 27 L. Ed. 117, says: "It is said to be a well established rule that a mortgagee obtains a specific lien upon rents and profits by diligently securing the appointment of a receiver, and a second or other subsequent mortgagee may thus secure an advantage over the first mortgagee as to the rents collected, even though the first mortgagee may not receive from the foreclosure sale a sufficient amount to discharge his mortgage debt. But this rule is said to apply only to those cases where the first mortgagee is not a party to the suit."

Later, in section 582 of the same volume, pp. 753, 754, the author, citing Longdock Mills & Elev. Co. v. Alpen, 82 N. J. Eq. 190, 88 A. 623, says: "If a receiver, pending a foreclosure action by a subsequent mortgagee, is appointed on his motion, and for his benefit, such an appointment enures to his benefit only; and where no other lienholder asked to have the receivership extended to his lien, the rents and profits should be applied to the discharge of his debt only. A junior mortgagee, obtaining the appointment of a receiver thereby acquires a specific lien on the rents collected by the receiver and is entitled to them as against a prior mortgagee who made no application for the appointment of a receiver. The junior mortgagee is entitled to the rents collected, even though the prior mortgage contains a provision assigning the rents as further security upon default. The first mortgagee cannot have a deficiency judgment in his favor satisfied out of the funds collected by the receiver appointed at the instance of the second mortgagee."

Again the author, in the same volume, section 622, page 795, quotes with approval the following from the case of Post v. Dorr, 4 Edw. Ch. (N. Y.) 412, 414: "It was held 'to be an established rule, that a second or third mortgagee who succeeds in getting a receiver appointed, becomes thereby entitled to the rents collected during the appointment, although a prior mortgagee steps in and obtains a receivership in his behalf and fails to obtain enough out of the property to pay his debt. This is on the principle that a mortgagee acquires a specific lien upon the rents by the appointment of a receiver of them; and if he be a second or third incumbrancer, the court will give him the benefit of his superior diligence over his senior, in respect to the rents which accrued during the time that the elder mortgagee took no measure to have the receivership extended to his suit and for his benefit.'"

Clark on Receivers (2d Ed.) vol. 2, section 953, page 1373, states the rule as follows: "A junior mortgagee has the right to foreclose his mortgage upon default and on the ground of inadequacy of security, or other ground * * * and when such receiver is appointed, he is appointed for the benefit of the junior mortgagee. Such junior mortgagee may through a receiver obtain the rents and profits of the mortgaged property. A senior mortgagee desiring to obtain such rents and profits to apply on his mortgage should actually possess himself of them or of the right to them through some mutual arrangement therefor, or he should make application to the court to have the receivership extended for his benefit."

In line with the above is our section 564 of the Code of Civil Procedure, subdivision 2, as amended by St. 1933, p. 1867, which reads: "In superior courts a receiver may be appointed by the court in which an action or proceeding is pending * * * in the following cases: * * * 2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt."

Although the order appointing the receiver is not before us, enough appears to show that the junior mortgagee proceeded under said subdivision of said section 564; also that the senior mortgagee, though a party defendant, made no effort to share in the fruits of the receivership. He was not in fact a real party in interest, save alone on the question of priority of lien, as he did not join in the foreclosure. The junior mortgagee could have dismissed as to the senior mortgagee without affecting the rights of said mortgagee. And by not joining in the request for a receiver, said senior mortgagee could not have appealed from an order denying the application, had it been made. By the independent action for foreclosure, the senior mortgagee evinced, not only a desire not to ask for foreclosure in the previous action, but showed conclusively a lack of interest in the previous receivership as well as an election to forego this mode of relief on its own account.

Had no receivership been applied for, said rents, issues, and profits from the property would have inured to the benefit of the mortgagor and been wholly lost to both mortgagees. We therefore conclude that the petitioner has a special lien upon these funds, subject to the rights of the mortgagor, and respondent mortgagee is without any rights therein. These funds are the res or subject-matter of the foreclosure action instituted by petitioner. Although, by a foreclosure of the senior mortgage, the property itself has been taken from under petitioner's lien, still said funds remain yet to be disposed of by a plenary judgment in the action, and respondent bank is without interest of any kind therein or in the judgment that may follow in the case.

[2] This conclusion renders comparatively simple the disposition of the further contention that the writ of certiorari is not available. It seems clear that by a summary order a court may not divest itself of the subject-matter of the action and award it to a party with no interest whatsoever therein without exceeding its jurisdiction. Such order is not upon a collateral matter, but is a complete divestiture of jurisdiction in advance of a trial on the merits. Such a procedure is unknown to the practice, and an order made under such circumstances may be annulled upon certiorari. Stanton v. Superior Court, 202 Cal. 478, 261 P. 1001.

The petition is sustained, and the order is annulled.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; SHENK, J.

2 Cal.2d 13

In re EXTERSTEIN'S ESTATE.

EXTERSTEIN v. HIGGINS.

L. A. 1418.

Supreme Court of California.

Nov. 26, 1934.

1. Executors and administrators 🔑35(17)

Recitals in minute order by court on petition for removal of executrix of estate *held* sufficient.

Minute order recited that petition to remove executrix and to order paid into estate moneys received from life insurance upon deceased payable to executrix as widow, be denied, and that order was made after findings by court that premiums for life insurance policies were paid out of community funds while decedent knew himself to be insolvent, but not with fraudulent intent either of himself or his wife.

2. Trial 🔑393(3)

Recitals in judgment or decree, though not in usual form, constitute sufficient compliance with statute requiring decision of question of fact by court to be in writing (Code Civ. Proc. § 632).

3. Trial 🔑393(3)

Where order, containing sufficient findings, is entered at length in minute book of court, it may be considered to be in writing and sufficient under statute requiring decision by trial court on question of fact to be given in writing (Code Civ. Proc. § 632).

4. Trial 🔑393(3)

Order denying petition to remove executrix, containing sufficient recitals, when entered in minute book, *held* in writing and sufficient under statute requiring decision of trial court on question of fact to be given in writing (Code Civ. Proc. § 632; Probate Code, § 1221).

5. Executors and administrators ⚷35(19)

Order denying petition by creditor to remove executrix of estate *held* appealable order, which became final and conclusive in absence of appeal, and could not be revoked on ground that it was entered through inadvertence.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Proceedings in the matter of the estate of Herman J. Exterstein, deceased. From an order vacating an order denying a petition by Claude G. Higgins to remove Pearl V. Exterstein as executrix, and allowing a motion to reset the cause for hearing, the executrix appeals.

Order reversed.

Walters & Mauk and N. D. Papa-Dakis, all of Los Angeles, for petitioner and appellant.

William Ellis Lady, of Los Angeles, for contestant and respondent.

THOMPSON, Justice.

This is an appeal from an order vacating an order denying a petition by a creditor to remove an executrix because she failed to account for all the property of the estate, and allowing a motion to reset the cause for hearing. That part of the order vacating the former order was on the court's own motion, and the remainder was in reference to respondent's motion.

On December 12, 1929, Claude G. Higgins, a creditor, filed a petition for the removal of Pearl Exterstein as executrix of the estate of Herman J. Exterstein, her husband, for failing to include in her inventory and account moneys received by her on two policies on the life of the deceased; Pearl V. Exterstein being named as beneficiary in the policies. Petitioner alleged that he was a creditor of the estate whose claim had been established by judgment against the estate, that the premiums on the policies were paid by Exterstein out of the community property at a time when he was insolvent and that Pearl Exterstein gave no consideration therefor, but that the policies were obtained in furtherance of a plan or arrangement entered into by the Extersteins with the purpose of hindering, delaying, and defrauding their creditors, and, in particular, the petitioner.

The executrix answered, putting in issue the insolvency of Exterstein at the time of the issuance of the policies, the existence of any plan, arrangement, or intent to defraud creditors, and the payment of consideration by herself, and alleging that she did not include the proceeds of the policies in the inventory and account of the property of the estate for the reason that they did not constitute assets of the estate, but were received by her for her own use and benefit. The matter was heard in the superior court, and, on September 12, 1931, the following minute order was made: "Petition to remove Executrix and to order paid into the estate moneys received from life insurance upon deceased payable to Pearl V. Exterstein, the widow, is denied. This Order is made after Findings by the court that the premiums for such life insurance policies were paid out of the community funds by Herman J. Exterstein while he knew himself to be insolvent but not with fraudulent intent either of himself or Mrs. Exterstein."

On January 23, 1933, contending that the above order was without effect, the respondent moved in the superior court for an order setting for hearing his petition for the removal of appellant as executrix and to order the insurance money paid into the estate. The motion was made upon the ground that no findings of fact or conclusions of law or judgment which constituted the decision of the court had been entered, and the judge who heard the petition was no longer acting judge of the court in which the matter was heard. The motion was granted, and the order of September 12, 1931, was, as heretofore stated, on the court's own motion, set aside because of inadvertence.

It is from this latter order that this appeal is taken; appellant contending that the minute order of September 12, 1931, was a final determination of respondent's petition and hence the court was without authority to order it set aside. Respondent insists, upon the authority of Estate of Pendell, 216 Cal. 384, 14 P.(2d) 506, and Estate of Seipel, 130 Cal. App. 273, 19 P.(2d) 808, that a disposition of the petition required the determination of questions of fact and hence findings in writing were necessary.

[1] There can be no doubt under the authorities that the recitals in the minute order under examination are sufficient (Ready v. McDonald, 128 Cal. 663, 61 P. 272, 79 Am. St. Rep. 76, and David v. Frost, 122 Cal. App. 750–754, 10 P.(2d) 504), provided it may be said that they are "in writing" as required by section 632, Code of Civil Procedure.

[2] In this connection we observe, first, that recitals in a judgment or decree, though not

in the usual form, constitute a sufficient compliance with the section. Hibernia S. & L. Society v. Clarke, 110 Cal. 27, 42 P. 425; Hopkins v. Warner, 109 Cal. 133–139, 41 P. 868; Locke v. Klunker, 123 Cal. 231–239, 55 P. 993; Shaingold v. Shaingold, 191 Cal. 438, 216 Pac. 803; Consolidated Irr. Dist. v. Crawshaw, 130 Cal. App. 455, 20 P.(2d) 119. Next we notice section 1221 of the Probate Code, which reads: "All orders and decrees of the court or judge must be entered at length in the minute-book of the court, or else signed by the judge and filed; but decrees of distribution must always be so entered at length."

[3, 4] It is apparent that, had the order in this case, incorporating the recitals it contains, been signed by the judge under the alternative provision of section 1221, the findings would have been sufficient. The question then is: When the order containing sufficient findings is entered at length in the minute book of the court, may it be considered to be "in writing" and sufficient? We think so. Section 1221 introduces a procedure which is peculiar to probate. The reason for the legislative requirement expressed in section 632 of the Code of Civil Procedure rests in the desirability of certainty and finality. It can scarcely be said that there is less certainty or less finality to findings which are written out in the minute book of the court than to findings which are incorporated in the signed order or judgment. Furthermore, there is a decree of convenience provided for by the Legislature for probate orders which cannot be brushed aside.

Nothing herein said is contrary to anything contained in Estate of Pendell or Estate of Seipel, supra. In the Pendell Case the point was not considered for the very obvious reason that the order there in question did not contain any findings of fact. We have taken the pains to corroborate this statement by an examination of the transcript in that case. In the Seipel Case the judgment was signed and filed seven days before the findings were filed. Hence the judgment was premature.

[5] There is a further reason why the order appealed from in this case should be reversed. The order which it purported to set aside was an appealable order. Section 1240, Probate Code. In the absence of an appeal, it became final and conclusive. In re Stevens' Estate, 83 Cal. 322–326, 23 P. 379, 17 Am. St. Rep. 252; Estate of Nolan, 145 Cal. 559–561, 79 P. 428; In re Welch's Estate, 106 Cal. 427, 39 P. 805; Estate of Davis, 151 Cal. 318–324, 86 P. 183, 90 P. 711, 121 Am. St. Rep. 105. The motion did not seek to have the order of September 12, 1931, set aside under section 473 of the Code of Civil Procedure. In fact, the motion of respondent purported to consider the original order as of no moment and a nullity, and it was set aside by the court upon its own motion. Having become final and conclusive, it was beyond the power of the court to revoke in this manner.

The order is reversed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

2 Cal.App.2d 575

RUBENS v. WHITTEMORE et al.

Civ. 8328.

District Court of Appeal, Second District,
Division 1, California.

Dec. 4, 1934.

1. New trial ⇨138

Order at close of plaintiff's case granting nonsuit as to one of defendants was judgment of nonsuit, and hence notice of intention to move for new trial given thereafter could be considered as relating to judgment of nonsuit, and gave jurisdiction to trial court to grant new trial (Code Civ. Proc. § 660, as amended by St. 1929, p. 842).

2. New trial ⇨155

Where no notice of entry of judgment was served before filing of notice of intention to move for new trial, time in which court might grant motion commenced with filing of notice of intention to move for new trial rather than from notice of entry of judgment filed thereafter, and expired sixty days thereafter (Code Civ. Proc. § 660, as amended by St. 1929, p. 842).

◆

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Frank S. Rubens against Noble E. Whittemore and the Arrowhead Highlands Company. From an adverse order, the second named defendant appeals.

Reversed.

Elmer P. Bromley and H. E. Lindersmith, both of Los Angeles, for appellant.

P. R. Hornbrook and J. Harper Shoop, both of Los Angeles, for respondent.

SHINN, Justice pro tem.

Arrowhead Highlands Company, one of the defendants, appeals from an order granting plaintiff a new trial.

At the close of plaintiff's case, on June 9, 1931, the court made and entered an order granting a nonsuit in favor of said defendant. The trial proceeded as to the other defendant, and on August 29, 1931, findings and judgment were signed and filed, awarding costs to the defendants. In the meantime, on August 24, 1931, plaintiff served upon the defendants and filed his notice of intention to move for a new trial. Plaintiff's motion was presented and submitted October 20, 1931. On October 23, 1931, defendants served on plaintiff notice that judgment had been entered in favor of the defendants September 1, 1931. On December 18, 1931, the court made its order granting plaintiff a new trial as to the defendant Arrowhead Highlands Company and denying the motion as to the other defendant.

[1, 2] Appellant argues that the court was without jurisdiction to grant a new trial, for the reason that the notice of intention was given before findings and judgment were signed and filed and was ineffectual for any purpose because it was prematurely given, and for the further reason that the time in which the court could grant a new trial had expired before the order was made. It is not claimed, nor do we believe it could be successfully contended, that the order of June 9, 1931, was not a judgment of nonsuit. Taking the view most favorable to respondent, the notice of intention to move for a new trial may be considered as relating to the judgment of nonsuit. The notice was effective to give the court jurisdiction to grant a new trial after the judgment of nonsuit. The other point raised, namely, that the court was without jurisdiction to make the order because the time had expired, is answered when it is determined when the time commenced to run. If the time in which the court could grant plaintiff a new trial as to defendant Arrowhead Highlands Company commenced to run on August 24, the date of the notice of intention, the time within which the court might grant a new trial had expired before the order was made. If the time commenced to run October 23, the date on which notice of entry of judgment was given, it had not expired on December 18 when the order was made. This question is answered in appellant's favor in Iske v. Stockwell-Kling Corporation, 128 Cal. App. 192, 17 P.(2d) 203, 204. In that case a notice of entry of judgment was filed four days after the filing of a notice of intention to move for a new trial. It was contended there, as here, that the time commenced to run upon the later date. The court, after quoting the provisions of section 660 of the Code of Civil Procedure and comparing the provisions after the amendment in 1929 (St. 1929, p. 842) with those prior to the amendment, said: "A comparison of the section as amended and as it stood prior to the amendment leaves no doubt but that the Legislature intended by the amendment that in cases where no notice of entry of judgment is served prior to the filing of notice of intention to move for a new trial, the sixty-day period begins to run from such time and that no notice of entry of judgment is necessary before a motion for a new trial may be made, and properly so because the notice of intention indicates actual notice. The section as amended is in the alternative, providing that the court may pass upon the motion within sixty days 'from and after service on the moving party of written notice of the entry of the judgment, or if such notice has not theretofore been served, then sixty (60) days after filing of the notice of intention to move for a new trial.'"

In the present case, no notice of entry of judgment had been served before the filing of the notice of intention to move for a new trial. Hence the time commenced to run within which the court might grant the motion on August 24, 1931, and expired sixty days thereafter. The order must be reversed as having been made without jurisdiction, and it is so ordered.

We concur: CONREY, P. J.; HOUSER, J.

2 Cal.App.2d 310

STUART v. PRESTON et al.*

Civ. 9382.

District Court of Appeal, First District,
Division 2, California.
Nov. 20, 1934.

Rehearing Denied Dec. 20, 1934.

Hearing Denied by Supreme Court
Jan. 17, 1935.

1. Attorney and client 🔑167(2)

In action on quantum meruit by attorney for legal services rendered, in which issue of express contract was raised as special defense, issue *held* for jury, where evidence was conflicting.

2. Appeal and error 🔑989

In reviewing court, question of sufficiency of evidence is limited to single inquiry whether there is substantial evidence supporting verdict where trial by jury was matter of right.

3. Appeal and error 🔑994(2)

Appellate court may not after trial by jury disbelieve respondent's witnesses and disregard all their testimony.

4. Attorney and client 🔑166(3)

Evidence *held* sufficient to sustain jury's finding as to reasonable value of legal services in action on quantum meruit by attorney.

5. Evidence 🔑553(4)

That facts assumed in hypothetical question are controverted by adversary's evidence does not render question improper, where there is substantial evidence in support of assumptions thereof.

6. Appeal and error 🔑882(7)

In action for legal services brought by attorney against fellow attorneys, cross-examination of one defendant concerning his practice of law while occupying judicial office *held* not subject to objection of immateriality, where defendants had taken position that defendant justice was still qualified to practice law outside courts.

7. Appeal and error 🔑232(2)

Attorneys could not object for first time on appeal, in action brought against them by fellow attorney for legal services, that cross-examination of one of defendants as to his practice of law while occupying judicial post was intended to prejudice jury, where only objection raised below was on ground of immateriality.

8. Witnesses 🔑275(2)

Where plaintiff testified that defendants had quarreled before and during trial in which legal services sued for were rendered, and one defendant denied having quarreled at any time with codefendant, and both claimed that they had personally conducted the litigation, *held* that cross-examination of defendant as to differences arising with codefendant after plaintiff's employment terminated was proper.

9. Attorney and client 🔑167(3)

In attorney's action for value of services in handling litigation, court properly refused to instruct jury as to correct answers to legal questions involved in that litigation, where instructions were sought on ground that correctness of claim presented therein would warrant reducing compensation to attorney.

On Petition for Rehearing.

10. Trial 🔑244(1)

It is error for trial court in its instructions to single out certain issues or isolated portions of evidence.

11. Attorney and client 🔑167(3)

In action for legal services, requested instruction as to sufficiency of complaint in former action in which services were rendered *held* properly refused, where plaintiff merely claimed that amendment was pertinent without attacking sufficiency of complaint.

12. Attorney and client 🔑167(3)

In action for legal services, requested instructions as to effect of evidence and conflict thereof in prior action in which services were rendered and as to clearness of compensation contract therein involved *held* properly rejected as involving questions of fact answered by evidence in prior case.

◆

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Theodore M. Stuart against John W. Preston and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Hearing denied by Supreme Court; PRESTON, J., being disqualified KNIGHT, J., of District Court of Appeal, Division 1, sits pro tem.

Hatch & Mahl and C. F. Rafferty, all of San Francisco, and Fitzgerald, Abbott & Beardsley, of Oakland, for appellants.

John Francis Neylan and Grove J. Fink, both of San Francisco, and Myron Harris, of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued on a common count for the reasonable value of legal services. The cause was tried before a jury, and plaintiff had a verdict for $50,400. The defendants' motion for a new trial was denied, and they present this appeal from the judgment under the alternative method.

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*Rehearing denied 39 P.(2d) 441.

The defendants were attorneys under a written contract for a group of landowners known as the Herminghaus heirs in litigation involving water rights in the San Joaquin Valley and terminating in the case of Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 P. 607. The defendants' contract was a contingent one dependent upon the value of the water rights involved, certain payments to be made in event of sales by the landowners based upon a percentage of the selling price. After the affirmance of the judgment negotiations were carried on by the defendants in behalf of the Herminghaus heirs for the sale of the water rights to the power company, and at the same time other negotiations were conducted by the heirs independently for the same purpose. A dispute arose over the amount of defendants' fees for their services, and they commenced an action against the heirs for recovery. The plaintiff herein, a practicing attorney in the city of Fresno, was employed by the defendants to prosecute that litigation. The cause was tried before a jury, but on the motion of the plaintiff the trial court directed a verdict in their favor for the sum of $259,960, plus interest and costs, and on appeal that judgment was affirmed. Preston v. Herminghaus, 211 Cal. 1, 292 P. 953. Thereafter the plaintiff delivered to the defendants a check for approximately $311,000, covering this judgment with costs and accrued interest, less a loan of $2,500 which the heirs made to one of these defendants. A dispute immediately arose between the defendants as to the division of this fee, the defendant Preston demanding one-half of the fee while the defendant Peck insisted that he was entitled to two-thirds and Preston to one-third. Incidental to this dispute the defendants were unable to agree on a reasonable compensation to be paid to the plaintiff for his services, and this action followed. A protracted and acrimonious trial was held in which the attorneys and witnesses frequently strained the patience of the trial judge who conducted the trial with commendable dignity. In presenting their appeal the parties have not relaxed in their feelings toward each other, and for this reason it has become most difficult to sift the statements of fact which are based upon the record from those which are the personal opinions of counsel. We will discuss the cause as simply a case in assumpsit without regard to the parties involved or the personalities injected into the briefs.

[1] The first point raised by appellants is that their motion for a directed verdict should have been granted. The point is not tenable. The appellants concede that the evidence of an express contract is conflicting, and that there was substantial evidence offered by respondent that no fee was fixed by the parties. The issue of an express contract was raised by appellants as a special defense to the action in quantum meruit. Since the evidence was in conflict the issue was properly left with the jury.

The appellants then argue that, under respondent's version of the conversation of September 12, 1928, the parties agreed that appellant Preston could fix the fee himself, and that the respondent could not therefore maintain an action in quantum meruit. Here, too, there is a direct conflict in the evidence. The appellant Preston testified that no such agreement was made. The respondent testified that, at the time this conversation was had, the duties to be performed by him were very indefinite, that he refused to agree upon a specified fee, and that he told this appellant: "'* * * When it is all over you and I will sit down and figure out a fair and reasonable fee for the work I have done.' He said 'That is satisfactory. I will pay you and I will pay you well,' is exactly the words he used, and to that I replied 'Well, in the first instance, you can fix the amount of my fee yourself when we are through, because all I want is a fair and reasonable compensation for the services that I rendered, and we will sit down and fix it when it is all over,' and he said, 'That is fine, Ted.' And that ended the conversation in so far as the employment was concerned."

For the purpose of showing the construction of the parties, evidence was offered of a conversation held on September 27, 1928, wherein the parties discussed fixing the fee upon a contingent basis, and another on December 8, 1930, when respondent delivered to appellant Preston a check for $311,000 wherein they discussed the question of a reasonable fee on the basis of the entire absence of any express contract. The appellants argue that the evidence preponderates in their favor. But we are limited by the unbroken rule of authorities holding that, when there is substantial evidence supporting respondent's theory, the question is one for the jury. This state of the evidence is a complete answer to all that appellants say in support of their motion for a directed verdict. It answers as well their contention now made that, because of the express contract, the respondent should not be permitted to recover on a quantum meruit. With their premises lost in the conflict of evidence rule there is left no basis for their conclusion. To this extent the case is controlled by Batcheller v. Whittier, 12 Cal. App. 262, 107 P. 141, and Elconin v. Yalen, 208 Cal. 546, 282 P. 791, holding that, where there has been no meeting of the minds on the subject of compensation, but merely a contract of employment, the plaintiff may sue for the reasonable value of his services.

For their second point the appellants assign as error the refusal of the trial court to give a proffered instruction. The first part of the proposed instruction, relating to the issue of an express contract to pay a fixed fee, was fully covered by appellants' instruction numbered IV. The second part, relating to an agreement permitting appellant Preston to fix the fee and advising the jury that, if they found such an agreement, then plaintiff could recover but $2,500, was not supported by any evidence and would have been an incorrect statement of the law. The undisputed evidence of both parties was that no such agreement had been made, and that appellants did not pretend to fix the fee in the sum of $2,500 or in any other amount. The last part of the proposed instruction advising the jury that they could not consider the question of the reasonable value of respondent's services unless they found that no agreement was made between appellant Preston and respondent was fully covered by instruction No. IV given at appellants' request in so far as it related to the question of an express contract. But, in so far as it related to an agreement giving the appellant the right to fix the compensation, it was an instruction on an issue not raised and not supported by any evidence.

[2-4] The third point raised is that respondent's services were not reasonably worth the sum awarded. The appellants present this point under two heads—the sufficiency of the evidence to support the verdict, and the objections to the hypothetical question put to respondent's expert witnesses. As to the first question the evidence of the reasonableness of the fee takes a wide range. Five members of the bar called by the respondent gave values ranging from $46,000 to $62,500. Six members of the bar called by the appellants gave values ranging from $1,500 to $3,500. We must assume that all these witnesses were reputable lawyers, and that each testified honestly as to his opinion in the matter. We may assume also that the fee awarded is higher than we would have allowed if called upon to fix it in the first instance. But it should be borne in mind that this is not a case coming under section 4¾ of article 6 of the Constitution and section 956a of the Code of Civil Procedure where an appellate court may make findings of fact contrary to those made by the trial court. This is a case where a trial by jury was a matter of right. For this reason the question of the evidence is limited to the single inquiry whether there is substantial evidence supporting the verdict. That there is such evidence is conceded by appellants; their only argument on this branch of the case is that the appellate court should disbelieve respondent's witnesses and disregard all their testimony. That this is not the function of the appellate court after a trial by jury is settled beyond argument. In Treadwell v. Nickel, 194 Cal. 243, 251, 228 P. 25, 29, the Supreme Court, in considering the identical subject, said: "The question as to the reasonable value of the services rendered by the plaintiff was submitted to a number of able and competent attorneys, who testified in the case. Some of them advanced a lower figure than that claimed by him, but others fixed their value at amounts far in excess of that established by the verdict. Consequently the issue as to the value of the services may be considered as having been closed by the finding of the jury." To the same effect are Libby v. Kipp, 87 Cal. App. 538, 548, 262 P. 68; Grass v. Rindge Co., 84 Cal. App. 750, 766, 258 P. 673; Donovan v. Root, 114 Cal. App. 114, 117, 299 P. 568.

The appellants argue that they have found an exception to this rule in the language appearing on page 544 of 87 Cal. App., 262 P. 68, 70, 71, of the Libby Case that the judgment of the trial court is not controlling if "the sum allowed is plainly and palpably exorbitant and such as shocks the conscience of an appellate court. * * *" The court had in mind that principle governing the appellate courts in the review of verdicts generally and which is best stated in Davis v. Renton, 113 Cal. App. 561, 563, 298 P. 834, as follows: "The remedy for safeguarding against the danger of excessive verdicts is committed necessarily to a great extent to the judge who presides at the trial, and the reviewing court may interfere only in cases where the excess appears as a matter of law, or where the recovery is so grossly disproportionate to any compensation reasonably warranted by the facts as to shock the sense of justice or at first blush raise a presumption that it is the result of passion, prejudice, or corruption rather than honest and sober judgment."

There is no showing here that this verdict was the result of passion or prejudice. It is supported by the sworn testimony of reputable members of the bar. To hold that it is excessive (or so grossly excessive as to shock our consciences) we would have to find that all these witnesses swore falsely, and that the trial judge refused to perform his duty when he denied the motion for a new trial. Since the question is presented here merely on the theory that the judgment is excessive, and that we should exercise our independent judgment as lawyers and fix a reasonable fee, the obvious answer is that, under the authorities cited, that cannot be done.

[5] The second phase of this question is presented on the theory that the evidence of the services performed by the respondent was insufficient to support several portions of the hypothetical question propounded to respondent's witnesses. What counsel really mean is that there is a preponderance of evidence supporting their estimate of the value of these services. We will not extend the opinion by discussing these items severally. It is sufficient to say that in each instance substantial evidence was offered supporting each assumption found in the question, and that respondent cannot be denied the right to assume a statement of facts which he claims the evidence justifies, even though such facts are denied by his adversary. Treadwell v. Nickel, 194 Cal. 243, 267, 228 P. 25.

[6, 7] The fourth point raised by appellants involves the rulings on the cross-examination of Justice Preston concerning his practice of the law during his occupation of the office of a justice of the Supreme Court. To understand the questions raised it is necessary to state that the answer of the Herminghaus heirs to appellants' suit for attorney's fees raised the special defense that, while the action concerning the water rights was pending, Preston became a justice of the Supreme Court; that, as such, he was disqualified from practicing law, and had thereby breached his contract. The plaintiffs in that case countered this allegation with the assertion that, notwithstanding the occupation of the judicial office, the services had been rendered in accordance with the contract. The respondent in this case assigned this situation as adding to his embarrassment and worry in his capacity as attorney for the appellants in Preston et al. v. Herminghaus. The appellants countered with the assertion that such legal services as had been rendered after Justice Preston assumed his duties on the bench were within his rights as a justice of the Supreme Court because as such officer he was barred only from appearing in a court in this state. The whole issue was emphasized before the jury by the appellants in their effort to minimize the services rendered them by the respondent. For this purpose they insisted that they were in fact chief counsel in the litigation for attorney's fees, and that respondent was merely an assistant brought in to lend local color to the trial in Fresno county. For the same purpose they took the position that a justice of the Supreme Court was not disqualified from practicing law so long as he did not appear in any of the courts of this state. The respondent inquired as to their knowledge of the decision of our Supreme Court in State Bar v. Superior Court, 207 Cal. 323, 278 P. 432, where a contrary holding was made in relation to Judge Hardy of the superior court. The appellants also insisted that, because they had a contract for legal services calling for a contingent fee, they had a vested interest entitling them to proceed with the services, notwithstanding the section of the Constitution prohibiting a justice from engaging in the practice of the law. The respondent attacked this position as legally and ethically unsound. Thus the examination of the witnesses resolved itself into a controversy over legal principles, but the door for this cross-examination of the appellants and the subject-matter of the inquiry to which it extended was thrown wide open by them. Witnesses called by the respondent had testified that this circumstance was an item to which they gave consideration in estimating the value of respondent's services. The appellants countered with the assertion that it was an item of no consequence because Justice Preston was legally entitled to continue the practice under the circumstances. The cross-examination which is now criticized was directed to this testimony. Hence, when the appellants objected to the line of questioning on the single ground that the questions were immaterial, these objections were properly overruled. That they should now argue that the inquiry was designed to harass the appellants and to create prejudice in the minds of the jury is of no avail, because no objections of that character were made which would have enabled the trial judge to rule and no assignments of error or misconduct were made. Furthermore, on the request of the appellants, the trial judge instructed the jury on this phase of the case to the effect that a justice of the Supreme Court was not prohibited from practicing law except in a California court and was not prohibited from look

ing out for his own interests under the contract here involved.

[8] In appellants' fifth point they claim error in the examination as to differences that arose between the two appellants after respondent's employment terminated. The respondent had testified that the appellants had quarreled in Fresno before and during the trial of Preston v. Herminghaus. The appellant Preston had denied that they had ever quarreled at any time. This, of course, opened the cross-examination of that witness on the subject of quarrels irrespective of the time they occurred. The cross-examination of the appellant Peck on this subject was opened by his testimony on direct relating to a controversy which he had had with his codefendant. The materiality of the examination is apparent. The respondent had tendered evidence showing that he had two warring clients and that he had to assume the responsibility of bringing them together for the trial. The appellants had insisted that they had personally conducted the litigation, and that respondent was merely called in for local color. Under respondent's theory this had a direct bearing upon the question of the value of his services and he was entitled to prove that theory.

[9] Finally, it is argued that the trial court erred in refusing to instruct the jury as to the correct answers to various legal questions involved in Preston v. Herminghaus. Generally the appellants contend that certain services rendered by the respondent in examining a witness, in amending the complaint, and in defending the interpretation of the contract before the trial court and on appeal were valueless because the Supreme Court on that appeal held that the respondent in each instance was right. Hence they say, in effect, if an attorney successfully prosecutes a cause through trial and is sustained on appeal, it must be because the law was on his side and, therefore, the clients should not be required to pay much for his services. There is no authority for the proposition advanced by appellants, and, if the trial judge had given the instructions proposed by them, he would have committed error in taking from the jury the determination of essential questions of fact. The value of respondent's services cannot be determined on the basis of the answers which the Supreme Court in a lengthy opinion gave to these legal questions. A reference to that opinion will disclose that the court deemed these particular questions of such importance as to merit special comment and approval. The value of respondent's services is more properly determined on the basis of the difficulties which these matters gave to the respondent at the time—difficulties which the appellants concede were at the time deemed serious by them and which they, as able and learned attorneys, approved at the time with compliments to the respondent for the good judgment he then displayed.

The judgment is affirmed.

We concur: STURTEVANT, J.; DOOLING, Justice pro tem.

On Petition for Rehearing.

PER CURIAM.

The petition for a rehearing is denied.

The defendants asked the trial court to give four several instructions. It modified two and gave them as modified. The other two the trial court refused to give. On these rulings they predicate prejudicial error. They assert:

"The actual legal questions answered in the proposed instructions were as follows:

"(a) Did the complaint in Preston v. Herminghaus, state a cause of action before it was amended as a result of the respondent's suggestion?

"(b) What was the legal effect of the evidence given by the witness Brackenridge in response to a certain question, in other words, was the evidence in the Brackenridge deposition before this question was asked legally sufficient to support a verdict for the compensation claimed by the appellants?

"(c) Was there any material conflict in the evidence in the case of Preston v. Herminghaus, as the evidence was disclosed in the reporter's transcript which was in evidence in this case?

"(d) Was the written compensation contract involved in Preston v. Herminghaus clear and unambiguous upon its face?"

[10] Each question was addressed to issues made by the evidence and not by the pleadings. As to the propriety of refusing to give any one of the requested instructions, the proper rule has been settled by a long list of decisions. "It is undoubtedly error for a court to single out certain issues, or isolated portions of the evidence, thereby intimating that special consideration should be given thereto." 24 Cal. Jur. 843; Treadwell v. Nickel, 194 Cal. 243, 262, 228 P. 25; Still v. San Francisco, etc., Ry. Co., 154 Cal. 559, 572, 98 P. 672, 20 L. R. A. (N. S.) 322, 129 Am. St. Rep. 177; In re Estate of Martin, 170 Cal.

657, 672, 151 P. 138; Boa v. San Francisco-Oakland T. Rys., 182 Cal. 93, 101, 187 P. 2; In re Estate of Clark, 180 Cal. 395, 399, 181 P. 639; Huyck v. Rennie, 151 Cal. 411, 417, 90 P. 929; Kauffman v. Maier, 94 Cal. 269, 283, 29 P. 481, 18 L. R. A. 124; Sullivan v. People's Ice Corp., 92 Cal. App. 740, 745, 268 P. 934. The same rule has been followed generally in the federal and state courts. 64 C. J. 686. The record in the instant case shows no reason for departing from that rule. The deposition of the plaintiff was taken before the trial, and on the trial he appeared as a witness in his own behalf and was examined and cross-examined. Each party called leading members of the bar and propounded to each witness its hypothetical question. Each of those witnesses was examined and cross-examined. No factor in the claim of the plaintiff was excluded when examining said witnesses. No error in ruling on evidence is claimed. If, as defendants now assert, certain services which the plaintiff claimed he rendered were of negligible importance and therefore of negligible value, the defendants had a full opportunity to develop the facts and obtain appropriate rulings on the law when such witnesses were under examination.

[11, 12] The first question (a) is not a correct statement of the question that was before the court. The plaintiff did not contend that the complaint in Preston v. Herminghaus before the amendment did not state a cause of action. He claimed that the amendment was pertinent for the purpose of more specifically defining the subject-matter for which the plaintiff Preston was claiming relief. As to the effect of the amendment the record discloses that Judge Strother, who permitted the amendment, stated that it made no material change in the pleading. He was the one to decide the point and his opinion was presumptively correct. The next question (b) was not a question of law, but was one of fact for the jury and was answered by the testimony contained in the transcript in Preston v. Herminghaus, which was in evidence for the information of the jury. Moreover, the subject was fully covered by instruction No. 12, which was given. The next question (c) was also a question of fact for the jury and not one of law. It was answered by the evidence introduced to the effect that Judge Strother, in Preston v. Herminghaus, granted a motion for a directed verdict, which may legally be done only when there is no "material conflict" in the evidence, and his judgment was affirmed on appeal. 211 Cal. 1, 292 P. 953. As to the last question (d) it was also answered by the same ruling.

For each of the foregoing reasons the trial court in the instant case committed no error in refusing to give any of the rejected instructions.

2 Cal.App.2d 1

HANEY v. TAKAKURA.

Civ. 5145.

District Court of Appeal, Third District, California.

Dec. 3, 1934.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Prior opinion, 37 P.(2d) 170.

Gumpert & Mazzera and C. H. Hogan, all of Stockton, for appellant.

Nutter & Rutherford and A. P. Hayne, all of Stockton, for respondent.

PER CURIAM.

It is hereby ordered that the following words contained in the above-entitled opinion which appear just after the fourteenth paragraph therein, to wit: "At the request of the plaintiff the court gave to the jury the following instructions," be stricken therefrom and the following inserted in lieu thereof: "The court gave to the jury the following instructions, the first instruction being at the request of the plaintiff."

2 Cal.App.2d 300

In re BUSCH'S ESTATE.

BUSCH v. DAVIES et al.

Civ. 1454.

District Court of Appeal, Fourth District, California.

Nov. 19, 1934.

Wills ⚷324(3)

In will contest, evidence that will had been executed as result of undue influence *held* insufficient for jury.

Evidence disclosed that testator's daughter's husband told son who was disinherited in will that, if son did not deed ranch upon which testator held mortgage to testator, husband would see that son would not share in estate; that daughter stated in presence of testator that son was letting testator and his wife starve to death by not paying on mortgage; that testator would foreclose if son did not pay, and that daughter did not want son around, whereupon testator told daughter to keep quiet; that daughter's husband had said in testator's presence that son had made plenty of money from ranch, but that son did not provide for testator, and would have robbed testator blind but for daughter and her husband; and that testator made two wills one day apart two months after statements were made.

◆

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Proceeding by William Charles Busch to contest the will of Phillip Henry Busch, deceased, opposed by Samerida Davies, as executrix and legatee, and Henry Thomas Busch and others, legatees. From the judgment, the contestant appeals.

Affirmed.

Burton E. Hales and H. O. Harrawood, both of Redlands, for appellant.

Sarau & Thompson and A. Heber Winder, all of Riverside, for respondents.

BARNARD, Presiding Justice.

The appellant owned a ranch on which his father, Phillip Henry Busch, now deceased, held a mortgage. Because of a default in certain payments, the father started to foreclose the mortgage in the fall of 1930. Thereafter the appellant conveyed the ranch to his father in payment of the mortgage and in consideration of an additional cash payment. The father later died, leaving a will dated April 21, 1931, containing the following provision: "I give nothing to my son, William Charles Busch. I make this provision in my will for the reason that my wife and I received ill treatment by my said son, during our old age." It appears that another will had been executed by the deceased on the preceding day, in which a smaller share in the estate was left to the respondent executrix.

The appellant filed a contest to the probate of the will, alleging in a first cause of action that the deceased was of unsound mind, and in a second cause of action charging the respondent executrix and her husband with having procured the execution of the will through undue influence, in that they had made certain misrepresentations to the decedent with respect to the appellant, and that they had, in the presence of the testator, made derogatory and uncomplimentary remarks against the appellant, and that said misrepresentations and remarks had deceived the decedent and unduly influenced him in the making of said will. An answer was filed, and the matter was tried before the court without a jury. At the conclusion of the evidence, the respondents moved for a nonsuit as to both causes of action. The appellant consented to the granting of the motion as to the first cause of action, and that motion was granted. After argument, a nonsuit was also granted as to the other cause of action, and from the ensuing judgment this appeal is taken.

The only point raised is that the charge of undue influence is supported by some substantial evidence and that the granting of a nonsuit was therefore erroneous.

While the record contains no evidence of the kind usually relied on as tending to show the use of undue influence, the appellant contends that certain statements made by the respondent executrix and her husband constitute false representations, and, as such, are sufficient to make a substantial showing of undue influence. The appellant testified that Mr. Davies, the husband of the executrix, told him that, if he would deed the ranch to his father, he (Davies) would see that the appellant would eventually come in with the rest of the heirs on an equal basis, but that, if he did not meet that demand, he would see that he did not share in the will with the others. It is not even claimed that this statement was made in the presence of the testator or reported to him. The appellant also testified that on another occasion the executrix told him to leave his father's

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

home, and that "she said we wouldn't pay father his interest and money due him, and she didn't want us around there at all. * * * She said we were letting mother and father starve to death. * * * She said father would take steps to foreclose on me if I didn't pay." The appellant's wife testified to the same effect, but added that when the statements were made the testator told the executrix to "keep quiet." Another witness testified that she had heard the husband of the executrix say in the presence of the testator that the appellant "had made plenty of money while on the Oak Glen Ranch, but had failed to provide for his father and mother; that if it hadn't been for him and his wife, he didn't know what would have become of his father-in-law and mother-in-law. He also stated that Willie Busch would have robbed him (the testator) blind if it had not been for himself and wife; that the sons took no part in protecting the father."

With respect to the truth of the representations claimed to have been made to the deceased, the appellant testified that he had offered to take care of his parents if they would come and live with him, that they had refused to do this, and that he had never refused to pay his father money at any time, although he had been behind in his interest and, being unable to pay the same, had deeded the land back to his father in payment of the mortgage.

In Re Estate of Bryson, 191 Cal. 521, 217 P. 525, 533, the court said: "'In order to establish that a will has been executed under undue influence, it is necessary to show, not only that such influence has been exercised, but also that it has produced an effect upon the mind of the testator, by which the will which he executes is not the expression of his own desires.' Estate of Calkins, 112 Cal. 296, 44 P. 577. * * * Proof to establish undue influence must be had of a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made. Estate of Carithers, 156 Cal. 422, 105 P. 127. It consists in the exercise of acts or conduct by which the mind of the testator is subjugated to the will of the person operating upon it, some means taken or employed which have the effect of overcoming the free agency of the testator and constraining him to make a disposition of his property contrary to and different from what he would have done had he been permitted to follow his own inclination or judgment."

And in Re Estate of Anderson, 185 Cal. 700, 198 P. 407, 410, this language is used: "It is not undue unless the pressure has reached a point where the mind of the person subjected to it gives way before it so that the action of such person, taken in response to the pressure, does not in fact represent his conviction or desire, brought about perhaps by argument and entreaty, but represents in truth but the conviction or desire of another. As was said in Estate of Donovan, 140 Cal. 390, 394, 73 P. 1081, quoting from Chaplin: 'The true test of undue influence is that it overcomes the will without convincing the judgment.'"

It may be said of several of the statements relied upon by appellant as being misrepresentations that they are more in the nature of expressions of opinion than representations as to facts. While they disclose animosity toward the appellant, there is no evidence to indicate that even such statements as were made in his presence were believed or acted upon by the testator. On the occasion when most of the statements were made by the executrix, the testator reproved her for making the same. The will was executed more than two months after the last of these statements is supposed to have been made, and there is nothing to show that any of the respondents had anything to do with the making of the will other than the inference which the appellant would draw from the testimony above referred to. The fact that the testator then made two wills, a day apart, in the absence of evidence of any further activity on the part of any of the respondents, indicates that he was acting for himself. There is an entire absence of evidence relating to the time when the will was made, and there is no substantial proof that the will is not an expression of the desires of the testator, or that his mind was subjugated to the will of the executrix or her husband.

We think the evidence in this case fails to come up to the standard required to establish that a will has been executed as a result of undue influence. It might be said here as was said in Re Langford's Estate, 108 Cal. 608, 41 P. 701, 702: "The contention of respondents, when thoroughly sifted, seems to be about this: That there is evidence to the point that appellant had a general influence over the deceased, which ought to be classified as 'undue,' and that, therefore, although when he made his will, under the circumstances above stated, he was apparently free to act as he pleased, yet it must be inferred that this general influence of appellant accompanied him, subverting his volition, and coercing him to act against his real wishes. To maintain such a strained and difficult theory would require evidence very different from that presented in the record."

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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2 Cal.App.2d 456

FIRST NAT. BANK OF SANTA ANA v. KINSLOW.

Civ. 1515.

District Court of Appeal, Fourth District, California.

Nov. 27, 1934.

1. Bills and notes 🔑96

Pre-existing debt and extension of time *held* sufficient consideration to accommodation maker for renewal note given for other notes signed by others (Civ. Code, §§ 1605, 3110).

2. Bills and notes 🔑49

As between accommodation maker and payee, former was a principal, though payee knew she was a surety as between herself and other makers (Civ. Code, §§ 1605, 3110).

3. Bills and notes 🔑92(5)

Prejudice suffered by payee in surrendering prior notes of husband and in refraining from taking action thereon *held* sufficient consideration for renewal notes signed by wife after death of husband (Civ. Code, § 1605).

4. Appeal and error 🔑882(11)

Appellant cannot object that evidence of consideration for notes was lacking when her attorneys were responsible for its omission (Civ. Code, § 1605).

5. Bankruptcy 🔑363

Filing of claim by payee in bankruptcy proceeding involving one of makers of notes *held* not to relieve accommodation maker from liability for unpaid balance (Bankr. Act § 16a [11 USCA § 34]; Civ. Code, § 3110).

◆

Appeal from Superior Court, Orange County; L. N. Turrentine, Judge.

Action by the First National Bank of Santa Ana, a national banking association, against Lenora E. Kinslow. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Arthur E. Koepsel, of Balboa, for appellant.

Forgy, Reinhaus & Forgy, of Santa Ana (R. M. Crookshank, of Santa Ana, of counsel), for respondent.

BARNARD, Presiding Justice.

The respondent brought this action to collect the unpaid portions of three promissory notes, the face amounts of which were $5,500, $900 and $475, respectively. The first of these, dated December 22, 1931, was signed by the appellant and her husband and by her son and his wife. It appears that this note was given and accepted by the respondent as a renewal of three prior notes which had been signed by the appellant's husband and by the same son and his wife, the three prior notes having then been returned to the son. The second note was for $900, was dated May 23, 1933, was signed by the appellant alone, and was given to and accepted by the respondent as a renewal and in lieu of a note dated February 17, 1933, which was signed by the appellant's husband alone. The appellant's husband died on April 14, 1933, and when this second note was given, the husband's note of February 17, 1933, was marked paid and delivered to the appellant. The $475 note was dated October 11, 1933, and was signed by the appellant alone. It was given in renewal of a note for the same amount which was signed by the appellant and given to the respondent on May 17, 1933, the latter note having been, in turn, given as a renewal or in lieu of a note dated January 7, 1933, which was signed by the appellant's husband alone. The last-mentioned note was marked paid and given to the appellant at the time of the first renewal referred to.

From a judgment in favor of the respondent this appeal is taken, the main contention of appellant being that no consideration appears since the notes sued on were all given as renewals of notes previously signed by others and since the appellant received no money or property at the time of signing the same, and that findings to the effect that a consideration existed are without support in the evidence.

[1, 2] With respect to the first note for $5,500, the pre-existing debt and the extension of time which is disclosed by the terms of

that note and the notes of which it was a renewal, all of which appear in the record, show a sufficient consideration. Bridge v. Ruggles, 202 Cal. 326, 260 P. 553; Westphal v. Nevills, 92 Cal. 545, 28 P. 678; Mahana v. Van Alstyne, 179 Cal. 725, 178 P. 853. The appellant was an accommodation maker, and, as between herself and the payee, she will be held as a principal, even if the payee knew that she was, in fact, only a surety as between herself and the other makers. Civ. Code, § 3110; California National Bank v. Ginty, 108 Cal. 148, 41 P. 38.

The appellant contends that the facts with relation to the $5,500 note bring that part of this case within an exception to the general rule, and that, under the authority of Williams v. Hasshagen, 166 Cal. 386, 137 P. 9, it must be here held that there was no consideration for that note. In that case, the defendant was induced to execute a note in favor of a bank, and it was found that the note was procured by fraud, and also that the cancellation of certain pre-existing notes did not amount to a consideration, since the evidence established the fact that the defendant did not know that such notes had ever existed. In the case now before us, the appellant signed the note in question as an accommodation maker and she herself testified as follows: "My husband told me he had a note there he wanted me to sign for Henry, that is my son H. M., and, of course, my husband, whatever he told me to do, I thought was all right, and I done it, I signed the note. * * * I knew it was for him." The facts in the two cases differ materially, and the case relied upon is not controlling as an authority here.

[3] The second and third notes sued on were signed by the appellant after the death of her husband for the purpose of renewing similar notes executed by her husband prior to his death. Not only does the evidence show a novation, as held by the trial court, but a sufficient consideration appears in the prejudice suffered by the respondent in surrendering the prior notes and in refraining from taking action thereon (Civ. Code, § 1605).

[4] It may be further observed that the appellant's attack upon the consideration of all these notes comes with poor grace, since the record discloses that on the objection of her counsel the court refused to permit the respondent to prove that her husband secured these loans from the respondent through a statement, setting forth that he held title to certain valuable real property, that during his lifetime he deeded this property to the appellant, and that upon his death she recorded that deed. The additional evidence offered would have further shown that the respondent suffered a real prejudice in surrendering the prior notes (Whelan v. Swain, 132 Cal. 389, 64 P. 560), and an appellant should not be heard to object that evidence of consideration is lacking when his attorneys are responsible for its omission (Ralph v. Anderson, 187 Cal. 45, 200 P. 940).

[5] The only other point raised is that the court erred in refusing to permit the appellant to show that the respondent had filed a claim based upon the first note sued on, in a bankruptcy proceeding involving H. M. Kinslow, the appellant's son, who was one of the makers of that note. In our opinion, this attempt to collect something from one of the other makers of the note did not relieve the appellant from liability for the unpaid balance. Section 16a of the Bankruptcy Act (11 USCA § 34); Dundee National Bank v. Strowbridge (Sup.) 184 N. Y. S. 257; Pacific Bank v. Michaelson, 216 App. Div. 120, 214 N. Y. S. 715; In re American Paper Co. (D. C.) 255 F. 121.

For the reasons given the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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2 Cal.App.2d 404

HARRIS v. HILLAND et al.

Civ. 8168.

District Court of Appeal, Second District, Division 1, California.

Nov. 26, 1934.

1. Bills and notes 🔑469

Indorser *held* not liable upon note where holder suing thereon failed to allege and to prove presentment of note on its maturity to makers, demand for payment thereof, that notice of dishonor or nonpayment was given to indorser, or that indorser waived presentment for payment or notice of dishonor.

2. Appeal and error 🔑1011(1)

Finding upon conflicting evidence by trial court trying case without jury that indorser did not waive presentment for payment or notice of dishonor could not be disturbed.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Rebecca Harris against Charles F. Hilland and others. From a judgment for named defendant, plaintiff appeals.

Affirmed.

Elijah M. Smuckler, of Los Angeles, for appellant.

Bicksler, Smith, Parke & Catlin, of Los Angeles, for respondents.

HOUSER, Justice.

From the record herein it appears that an action was brought by plaintiff against defendant to recover judgment against the latter on account of his indorsement of a promissory note that was secured by a deed of trust. The complaint contained no allegation with respect to the presentment of the note on its maturity to the makers thereof nor any demand from them that they pay the amount due on said note.

On the hearing of the action, among the findings of fact made by the trial court were the following: "* * * That said promissory note was not presented to the makers thereof for payment on date of maturity, or at any time thereafter and no notice of dishonor or nonpayment by the makers of said note was given at any time to the defendant Charles F. Hilland. That the said defendant, Charles F. Hilland, did not waive presentment for payment or notice of dishonor."

From a judgment rendered in favor of defendant, the plaintiff has appealed to this court.

By her brief appellant declares that "the question involved on this appeal is—what acts on the part of an endorser constitute a waiver of presentment for payment in order to charge and fix the liability of the endorsers"?

[1] In 19 California Jurisprudence, p. 983, it is stated that it is the rule that in an action against an indorser the complaint must allege presentment to the principal debtor within the requisite time in accordance with the provisions of the Code, and a demand for payment; and several authorities are cited in substantiation of the rule there announced, especially Merchants' National Bank v. Bentel, 166 Cal. 473, 476, 137 P. 25. It therefore follows that, because of the failure of plaintiff to allege and to prove the essential facts relative to a presentment of the note on its maturity to the makers thereof, and a demand upon them that they pay the same, the trial court was authorized to make the finding of fact to which attention hereinbefore has been directed, and which is conclusive against plaintiff's alleged cause of action.

[2] With reference to the particular point urged by appellant, in substance that the evidence was insufficient to support that part of the findings of fact to the effect that defendant "did not waive presentment for payment or notice of dishonor," at the outset it need only be said that no waiver by defendant was pleaded by plaintiff in her complaint; moreover, that, although certain evidence was presented by plaintiff from which a waiver of defendant might have been implied, contrary evidence in that regard was adduced by defendants. Since the trial court was the exclusive judge of the facts of the case, its finding thereon cannot be disturbed by this tribunal.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

2 Cal.App.2d 563

SAN FRANCISCO MILLING CO., Limited, v. FRYE & CO.

Civ. 9364.

District Court of Appeal, First District, Division 1, California.

Dec. 4, 1934.

Hearing Denied by Supreme Court Jan. 31, 1935.

1. Sales 🔑384(2)

Measure of damages for buyer's refusal to accept portion of goods contracted for is difference between contract price and market price thereof at time of such breach of contract (Civ. Code, § 1784, subd. 3).

2. Sales 🔑62

Contracts, executed forty days apart, for sale of same quantities of foul seed at different prices on board ship at points on certain bay under first contract and on dock at city on such bay according to rules of such city's grain exchange under second contract, *held* separate and distinct contracts not to be construed together in seller's action for breach of second contract (Civ. Code, § 1642).

3. Sales 🔑90

Execution of written sale contract free from ambiguity or uncertainty, without fraud or mistake, supersedes all preceding or accompanying negotiations or stipulations (Civ. Code, § 1625).

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by the San Francisco Milling Company, Limited, against Frye & Co. Judgment for plaintiff, and defendant appeals.

Affirmed.

Joseph A. Brown, of San Francisco, for appellant.

Carl R. Schulz and Norman A. Eisner, both of San Francisco, for respondent.

JAMISON, Justice pro tem.

This is an action upon a contract for the sale by plaintiff to defendant of 1000 tons of foul seed. Judgment was rendered for plaintiff. Thereupon defendant moved for a new trial, and, same being denied, it prosecutes this appeal.

Two contracts for foul seed were produced at the trial of this action. One of them was dated April 5, 1930. This sale was confirmed by a man named King, of the firm of King Grain Company, brokers, acting on behalf of appellant. The confirmation in substance was that Frye & Co. confirmed the sale of 1000 tons of foul seed (seeds screened from barley, oats and wheat) at the price of $14 per ton of 2000 pounds, f. o. b. ship, San Francisco bay points. All of the foul seed called for by this contract was delivered and accepted except 14 tons, which were later delivered and accepted.

The contract dated May 15, 1930, was executed by both respondent and appellant. It provided that respondent sell to appellant 1000 tons of foul seed at $13 a ton, f. o. b. dock, San Francisco; the sale being made in accordance with the rules and regulations of the San Francisco Grain Exchange. Under this contract 182 tons were delivered to appellant on June 20, 1930, and were accepted and paid for. There was an overpayment of $182 by appellant on this shipment. On June 23d another shipment of 265 tons of foul seed was made by respondent. Both of these shipments were delivered at the wharf in San Francisco, were forwarded by a carrier selected by appellant, and were inspected by agents of appellant at the wharf in Seattle. Following said inspection appellant caused the last-named shipment of 265 tons to be transported in cars on a switching order naming appellant as consignee. This last-named shipment was not unloaded by appellant at its warehouse in Seattle, but was abandoned in the yards, and respondent was notified of such abandonment. In the meantime respondent had presented a draft to appellant for the amount of said shipment, which appellant refused to honor. It was then agreed by appellant and respondent that the said 265 tons might be returned to the wharf at Seattle, unloaded and sold, without prejudice to the rights of either party. Thereafter the said 265 tons were sold for the sum of $1,669.50, and, after paying the freight charges, etc., the net sum of $465.64 was realized.

[1] In addition to seeking to recover the purchase price of the 265 tons of foul seed delivered on June 23, 1930, respondent in this action asks judgment for damages for the refusal of appellant to accept the undelivered part of the foul seed called for by the contract. The court found that appellant refused to accept this undelivered portion, and this finding is supported by the evidence. The damage sustained by respondent by this refusal on the part of appellant to accept the undelivered portion of the foul seed is the difference between the contract price and the market price at the time of the breach. Subdivision 3, § 1784, Civ. Code; 22 Cal. Jur. 1062; Lillie v. Weyl-Zuckerman & Co., 45 Cal. App. 607, 188 P. 619; Gay v. Dare, 103 Cal. 454, 37 P. 466.

[2] Appellant contends that the two contracts should be construed together; that the contract entered into on May 15, 1930, and the contract between these parties which was executed on April 5, 1930, should be construed as one contract. In support of this contention it cites section 1642 of the Civil Code, which is that "several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." We are of the opinion that this contention cannot be sustained. These two contracts were entirely separate transactions. The first one was entered into on April 5, 1930, and the second on the 15th of May, 1930. There appears to be no connection between them. They were each separate and distinct sales of foul seed.

[3] There is no ambiguity or uncertainty in the contract of May 15, 1930, nor is any fraud or mistake alleged or proved. Therefore the

execution of the written contract supersedes all of the negotiations or stipulations which preceded or accompanied the execution of the instrument. Civ. Code, § 1625; Alameda County Title Ins. Co. v. Panella, 218 Cal. 510, 24 P.(2d) 163; 6 Cal. Jur. 261.

It is provided in the contract of May 15, 1930, that it is made in accordance with the rules and regulations of the San Francisco Grain Exchange and that these rules and regulations are made a part of the contract. The court found that the rules and regulations of said exchange, for all those dealing in foul seed and similar merchandise, were to the effect that, unless goods sold f. o. b. dock San Francisco, or f. o. b. dock San Francisco basis, were inspected or rejected at the point of delivery, to wit, on the dock at San Francisco, the right of inspection and rejection on the part of the buyer was thereby waived, that the foul seed in this case was sold and delivered f. o. b. dock San Francisco, and that any claim by appellant of rejection was waived by the failure to inspect or reject the foul seed at that point. This finding is supported by the evidence.

The court further found that, at the time this contract was entered into, there was in contemplation the imposition of an import duty upon the entry of foul seed from Canada to the United States which would cause a scarcity of foul seed for use as cattle feed, that the said contemplated duty was not imposed, and that Canadian foul seed became available in abundance, and thereby the market value of foul seed was materially reduced. It is claimed by respondent that the reduction in the price of foul seed caused appellant to repudiate the contract.

Appellant makes some claim that the seed which was delivered to it under the contract of May 15, 1930, was not foul seed, but, on the contrary, was garden seed. This claim is refuted by its own admissions contained in the complaint which was verified by its vice president in an action which it brought against respondent in the superior court of the state of Washington in July, 1931, and by the testimony of the experts produced by respondent.

Appellant contends that the court erred to its prejudice in overruling its objections to evidence produced by respondent, and in refusing to permit certain evidence offered by it. We are of the opinion that the court committed no reversible error in these rulings.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

PACIFIC FINANCE CORPORATION v. FIRST NAT. BANK OF PUENTE.*

Civ. 8390.

District Court of Appeal, Second District, Division 1, California.

Dec. 7, 1934.

Hearing Granted by Supreme Court Feb. 4, 1935.

Bills and notes ⚿63

Where plaintiff, upon receiving defendant bank's request to forward chattel mortgage and note for collection, answered that it would send the papers and releases on receiving full payment, plaintiff's letter *held* rejection of bank's offer, coupled with counter-offer, so that where bank subsequently mailed its draft but requested return thereof before it was received by plaintiff, and plaintiff's cashier stated he could see no reason for not returning it, there was no contract, and plaintiff did not become owner of draft.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Pacific Finance Corporation against the First National Bank of Puente. Judgment for plaintiff, and defendant appeals.

Reversed.

Harry J. McClean, of Los Angeles, for appellant.

John L. Rush, of Los Angeles, for respondent.

YORK, Justice.

Plaintiff, suing as owner and holder in due course, brought action against the defendant on the following bill of exchange:

"The First National Bank of Puente 90–651
"Puente, California, Oct. 17, '30 19....6742

"Pay to the order of Pacific Finance Corporation, $9,702.28 Registered ** 9,702 Dol's 28 cts.

"To First National Office, Security-First National Bank of Los Angeles, Los Angeles, California,

"Geo. L. Lower, Cashier."

It is evident that both of the parties to this action, as well as the trial judge, used the terms bill of exchange, draft, and check synonymously, as there is involved herein but one instrument, which is referred to by these various designations.

Upon trial of the action, it was stipulated between the parties that, in the event plain-

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 47 P.2d 460.

tiff was entitled to judgment, it be for the sum of $4,902.02, with interest. From a judgment in favor of plaintiff, defendant prosecutes this appeal.

It appears from the record that, before the bill of exchange was drawn, correspondence consisting of three letters passed between the plaintiff and defendant. On October 8, 1930, defendant bank wrote plaintiff corporation requesting it to forward to the bank for collection a chattel mortgage and note secured by 101 head of cattle, stating that arrangements had been made to pay off the loan. Plaintiff on October 9, 1930, replied by letter of the plaintiff "by T. Spencer" to the effect that it was against its policy to send out papers and releases before it had received payment in full, but that upon payment of $9,635.90, with interest at 8 per cent. from September 17, which was the balance due on the chattel mortgage, it would send to defendant the necessary papers together with releases.

In reply to plaintiff's letter of October 9th, defendant bank on October 17, 1930, wrote to plaintiff inclosing the bill of exchange which is heretofore set out in this opinion, and requested plaintiff to send to defendant bank the release of chattel mortgage and other papers. Whereupon, on October 22, 1930, plaintiff acknowledged receipt of the draft for $9,702.28 as payment in full of the balance due on the chattel mortgage, and inclosed therewith chattel mortgage, note, and release. Immediately after depositing in the mail its letter of October 17th with inclosed bill of exchange, defendant sought to recover same through the post office, but was unsuccessful in its attempt, and, within fifty minutes after said deposit was made, the cashier of defendant bank telephoned to plaintiff corporation and engaged in conversation with Spencer, in which the cashier asked that the bill of exchange be returned to defendant owing to a hitch in the deal, Spencer replying: "Well, it has not gotten here yet, so I don't see any reason why we cannot return it to you." Mr. Spencer testified upon cross-examination that "someone called stating that they had sent a draft paying off this paper and stating that in the rush of business of the afternoon they had made a little slip and they requested that we not put it through the bank, that we send it back. In reply I said I would look into it, that I saw no reason why it should not be returned." Meantime, defendant stopped payment on the bill of exchange, and, upon presentment of same by plaintiff, payment was refused by the bank upon which it was drawn.

Upon this appeal, appellant urges reversible error because of insufficiency of the evidence to sustain the findings and judgment, contending that the evidence conclusively shows a revocation of the offer to enter into a contract before the offer was accepted, and that, therefore, the finding of the existence and ownership of the contract is not supported by the evidence. In support of this contention, appellant urges that the letter of October 8th from defendant to plaintiff was an offer which was rejected by plaintiff's letter of October 9th, but that the letter of October 9th invited an offer from defendant, suggesting the general terms upon which such offer should be made. It is then urged by appellant that the letter of October 17th constituted the suggested offer, and that the plaintiff attempted to accept the offer therein contained by its letter to defendant dated October 22d, but that the offer contained in the letter of October 17th had been withdrawn or revoked by defendant before it was communicated to or accepted by the plaintiff. Appellant further urges that, assuming, for the sake of argument, that the letter of plaintiff to defendant dated October 9th contained an offer to defendant which it proposed to accept in its letter of October 17th, the evidence shows such acceptance was withdrawn before it was communicated to the plaintiff.

We believe that the letter of October 9th written by plaintiff constituted a rejection of defendant's offer of October 8th, and that, when defendant mailed its letter of October 17th inclosing the bill of exchange, that act would have constituted an acceptance of the offer, but for the fact that such acceptance was withdrawn before it was communicated to the plaintiff. The evidence stands uncontradicted that plaintiff's representative Spencer, who made the offer of October 9th, was on October 17th notified of defendant's withdrawal of the letter of acceptance of the then outstanding offer, and that Spencer made reply as hereinabove stated. At that time said letter of October 17th had not been received. We think that, under these facts, plaintiff never became owner of said bill of exchange.

The judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.

2 Cal.App.2d 619

DE BOLT v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

Civ. 9983.

District Court of Appeal, Second District,
Division 2, California.
Dec. 5, 1934.

Mandamus 🔑57(1)

Mandamus *held* not to lie to compel trial court to restore to bill of exceptions matters stricken therefrom by trial court (Code Civ. Proc. § 652).

◆

Mandamus proceeding by Ethel M. De Bolt against the Superior Court of Los Angeles County, and Honorable Thomas C. Gould, Judge.

Peremptory writ denied.

Charles M. Easton and Palmyra Pressly, both of Los Angeles, for petitioner.

David W. Richards and Henry F. Poyet, both of Los Angeles, for respondents.

STEPHENS, Presiding Justice.

One of the defendants in an action which was decided adversely to her seeks by a petition in mandamus to have restored to her bill of exceptions upon appeal matters stricken therefrom by the trial court. Section 652 of the Code of Civil Procedure prescribes the procedure to be taken in such a case.

A peremptory writ denied.

We concur: CRAIL, J.; SCOTT, Justice pro tem.

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2 Cal.App.2d 597

MASSA v. PATTON et al.

Civ. 8451.

District Court of Appeal, Second District,
Division 1, California.
Dec. 5, 1934.

Money paid 🔑9

Evidence *held* not to show that defendants were indebted to plaintiff, either for money expended for defendants' use and benefit or for money had and received, where parties agreed to form mining corporation and defendants were to convey mining claims, corporation was formed, plaintiff expended money on mining property, deed was given to corporation, but business was abandoned.

◆

Appeal from Superior Court, Los Angeles County; Ernest Weyand, Judge.

Action by Lawrence Massa against Benjamin M. Patton, also known as M. B. Patton, and another, in which defendants filed a cross-complaint. From an adverse judgment, defendants appeal.

Reversed.

Marcus L. Roberts, of Los Angeles, and Harry W. Horton, of El Centro, for appellants.

Sandor J. Vigg, of Los Angeles, for respondent.

CONREY, Presiding Justice.

The judgment herein, from which the defendants appeal, was rendered pursuant to findings in favor of the plaintiff upon two counts which are different forms of statement of the same claim. The findings of fact as made by the court below combine in one statement the court's answer to the issues tendered by both counts. The court finds that the defendants are, and that each of them is, indebted to the plaintiff in a stated sum, "for money paid, laid out and expended by the plaintiff to and for the use and benefit of the defendants, and of each of them, at their special instance and request, and at the special instance and request of each of them, and for money had and received by the defendants, and by each of them, from the plaintiff to and for the use and benefit of the plaintiff, within one year next prior to the commencement of this action." It will be assumed that in the last clause of this finding the court intended to say "for the use and benefit of the defendants," instead of "for the use and benefit of the plaintiff." The findings further show the facts of demand and nonpayment. It thus appears that the judgment is based upon an obligation which, according to the court's decision, arose out of an implied contract to repay said sum of money.

According to the evidence, it is an established fact that the plaintiff and the defendants, with two other persons (Ben F. Harrison and Harry K. Hedges), had entered into a written contract for the formation of a mining corporation, in which each one of the five should have an equal number of shares. The defendants and Harrison were to convey to said corporation certain mining claims owned by them. Afterwards certain transactions occurred in the course of which the plaintiff paid out and expended on said mining property the money which in this action he seeks to recover from the defendants. We have read the record of the trial, seeking to discover when, where, and how the defendants committed any breach of their contract. It appears to us that there is no such evidence. After the contract had been made, the plaintiff caused a corporation to be formed by three of the five persons, but leaving out Harrison and Walker. To this the defendants objected. It is a fact, nevertheless, that a deed of said mining claims to the corporation, which deed had been made and placed in the hands of the plaintiff's attorney, was recorded and the corporation took possession of the property. The money which the plaintiff seeks to recover from these defendants was expended upon said mining property. After some work had been done, and this money had been expended, further prosecution of the business was abandoned by the corporation and by the plaintiff.

We are of the opinion that the evidence fails to establish any facts which justify the conclusion that the defendants are indebted to the plaintiff, either for money expended by the plaintiff for the use and benefit of the defendants or for money had and received by them.

The judgment is reversed.

We concur: HAHN, Justice pro tem.; YORK, J.

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2 Cal.App.2d 324

SMITH v. ZIMBALIST.

Civ. 8083.

District Court of Appeal, Second District, Division 1, California.

Nov. 20, 1934.

Hearing Denied by Supreme Court Jan. 17, 1935.

1. Sales 🔑36

Parties to proposed contract of sale are not bound where each is honestly mistaken or in error with reference to identity of subject-matter.

2. Sales 🔑36

Seller *held* not entitled to recover for balance of price of violins, erroneously believed by both parties to have been genuine Stradivarius and Guarnerius violins and so mentioned in bill of sale, but which were in fact imitations (Civ. Code, § 1734).

3. Sales 🔑264

Description in bill of parcels or sale note of thing sold amounts to warranty by seller that subject-matter of sale conforms to such description (Civ. Code, § 1734).

◆

Appeal from Superior Court, Los Angeles County; J. O. Moncur, Judge.

Action by George H. Smith, as administrator of the estate of George Smith, deceased, against Efrem Zimbalist. From a judgment for defendant, plaintiff appeals.

Affirmed.

Bicksler, Smith, Parke & Catlin and Frank D. Catlin, Jr., all of Los Angeles, for appellant.

Glen Behymer and B. L. Hoyt, both of Los Angeles, for respondent.

HOUSER, Justice.

From the "findings of fact" made pursuant to the trial of the action, it appears that plaintiff, who was of the age of 86 years, although not a dealer in violins, had been a collector of rare violins for many years; "that defendant was a violinist of great prominence, internationally known, and himself the owner and collector of rare and old violins made by the old masters"; that at the suggestion of a third person, and without the knowledge by plaintiff of defendant's intention in the matter, defendant visited plaintiff at the home of the latter and there asked plaintiff if he might see plaintiff's collection of old violins; that in the course of such visit and inspection, "plaintiff showed a part of his collection to defendant; that defendant picked up one violin and asked plaintiff what he would take for the violin, calling it a 'Stradivarius'; that plaintiff did not offer his violins, or any of them, for sale, but on account of his age, after he had been asked what he would take for them, said he would not charge as much as a regular dealer, but that he would sell it for $5,000; that thereafter defendant picked up another violin, calling it a 'Guarnerius', and asked plaintiff what he would take for that violin, and plaintiff said if defendant took both violins, he could have them for $8,000; that the defendant said 'all right', thereupon stating his financial condition and asking if he could pay $2,000 cash and the balance in monthly payments of $1,000." Thereupon a memorandum was signed by defendant as follows:

"I hereby acknowledge receipt of one violin by Joseph Guarnerius and one violin by Stradivarius dated 1717 purchased by me from George Smith for the total sum of Eight Thousand Dollars toward which purchase price I have paid Two Thousand Dollars the balance I agree to pay at the rate of one thousand dollars on the fifteenth day of each month until paid in full."

In addition thereto, a "bill of sale" in the following language was signed by plaintiff:

"This certifies that I have on this date sold to Mr. Efrem Zimbalist one Joseph Guarnerius violin and one Stradivarius violin dated 1717, for the full price of $8,000.00 on which has been paid $2,000.00.

"The balance of $6,000.00 to be paid $1,000.00 fifteenth of each month until paid in full. I agree that Mr. Zimbalist shall have the right to exchange these for any others in my collection should he so desire."

That at the time said transaction was consummated each of the parties thereto "fully believed that said violins were made one by Antonius Stradivarius and one by Josef Guarnerius"; that preceding the closing of said transaction "plaintiff made no representations and warranties as to said violins, or either of them, as to who their makers were, but believed them to have been made one by Antonius Stradivarius and one by Josef Guarnerius in the early part of the eighteenth century; that plaintiff did not fraudulently make any representations or warranties to defendant at the time of said purchase"; that there was "a preponderance of evidence to the effect that said violins are not Stradivarius or Guarnerius violins, nor made by either Antonius Stradivarius or Josef Guarnerius, but were in fact made as imitations thereof, and were not worth more than $300.00."

The action which is the foundation of the instant appeal was brought by plaintiff against defendant to recover judgment for the unpaid balance of the purchase price of the two violins.

As is shown by the conclusions of law reached by the trial court from such facts, the theory upon which the case was decided was that the transaction in question was the result of "a mutual mistake on the part of plaintiff and defendant," and consequently that plaintiff was not entitled to recover judgment. From a judgment rendered in favor of defendant, plaintiff has appealed to this court.

In urging a reversal of the judgment, it is the contention of appellant that the doctrine of caveat emptor should have been applied to the facts in the case; that is to say, that in the circumstances shown by the evidence and reflected in the findings of fact, the trial court should have held that defendant bought the violins at his own risk and peril.

The substance of the argument presented by appellant is a recast of the decision at nisi prius in the case of Jendwine v. Slade (1797) 2 Espinasse, 572. The syllabus in that case is as follows:

"The putting down the name of an artist in a catalogue as the painter of any picture, is not such a warranty as will subject the party selling to an action, if it turns out that he might be mistaken, and that it was not the work of the artist to whom it was attributed."

It there appears that therein (as similarly in the instant case) "several of the most eminent artists and picture dealers were called, who differed in their opinions respecting the originality of the pictures."

Lord Kenyon (the nisi prius judge) said: "It was impossible to make this the case of a warranty; the pictures were the work of artists some centuries back, and there being no way of tracing the picture itself, it could only be matter of opinion whether the picture in question was the work of the artist whose name it bore, or not. What then does the catalogue import? That, in the opinion of the seller, the picture is the work of the artist whose name he has affixed to it. The action in its present shape must go on the ground of some fraud in the sale. But if the seller only represents what he himself believes, he can be guilty of no fraud. The catalogue of the pictures in question leaves the determination to the judgment of the buyer, who is to exercise that judgment in the purchase. * * *"

In the case of Chandelor v. Lopus (1603) 2 Cr. Rep. 4, 79 English Rep. 3 (Full Reprint), which in the state of New York for many years was relied upon as the leading authority in situations similar to that present herein, it was held that where one sold a jewel as a bezoar stone which in truth it was not, no action would lie, unless in the complaint or declaration it was alleged that the seller knew that it was not a bezoar stone, or that he warranted the stone to be such.

In Seixas v. Woods (1805) 2 Caines (N. Y.) 48, 2 Am. Dec. 215 (Chancellor Kent writing a concurring opinion), a sale of wood which both parties to the transaction supposed was brazilletto, when in fact it was peachum, in the absence of express warranty by the seller, was held binding on the buyer. It was also ruled that "mentioning the wood, as brazilletto wood, in the bill of parcels, and in the advertisement some days previous to the sale, did not amount to a warranty to the plaintiffs."

In the case of Swett v. Colgate (1822) 20 Johns. (N. Y.) 196, 11 Am. Dec. 266, it was held that where one, without express warranty, sold what he supposed was barilla, which he advertised as barilla, which he invoiced as barilla, and which prior to the sale thereof the purchaser examined "several times," but which after the sale was found to be kelp, the rule of caveat emptor, as announced in Chandelor v. Lopus, supra, would apply. And so in Welsh v. Carter (1828) 1 Wend. (N. Y.) 185, 19 Am. Dec. 473, which likewise involved the sale of an article known as barilla, but which in fact was a fraudulent imitation of it and entirely worthless, the contract was held binding on the purchaser who, before the sale, was told that he "must judge for himself," and who had a sample of the "barilla" analyzed.

But with reference to the first cited case (Seixas v. Woods, in which Chancellor Kent wrote a concurring opinion), in 2 Kent's Commentaries, § 479, in part it is said:

"There is no doubt of the existence of the general rule of law, as laid down in Seixas v. Woods; and the only doubt is whether it was well applied in that case, where there was a description in writing of the article by the vendor which proved not to be correct, and from which a warranty might have been inferred. But the rule fitly applies to the case where the article was equally open to the inspection and examination of both parties, and the purchaser relied on his own information and judgment, without requiring any warranty of the quality. * * *"

Likewise, in 2 Blackstone's Commentaries, *451, the exception to the general rule is there noted as follows: "But with regard to the goodness of the wares so purchased, the vendor is not bound to answer; unless he expressly warrants them to be sound and good, or unless he knew them to be otherwise, and hath used no art to disguise them, or unless they turn out to be different from what he represented them to the buyer."

In Hart v. Wright (1837) 17 Wend. (N. Y.) 267, in commenting on the rule applied in Seixas v. Woods, it is said:

"These cases have not been overruled, and their principles have not been seriously questioned anywhere. It has been doubted whether those which deny a warranty to be implied by description in a sale note, bill of parcels, etc., were not a wrong application of the common law rule, 2 Kent, Com., 479, 3d Ed.; and they have been severely criticized and generally repudiated in our sister states, whose courts hold, with the English cases, that such a description is a warranty of kind and quality, as far as it goes. Yates v. Pym, 6 Taunt. 446, S. C., 2 Marsh, 141; Shepherd v. Kain, 5 Barn. & Ald. 240; Gardiner v. Grey, 4 Campb., 144, as explained [Hastings v. Lovering], 2 Pick. [Mass.] 219, 220; Bridge v. Wain, 1 Stark. R. 504; Rowe v. Osborne, 1 Stark. R. 140; Prosser v. Hooper, 1 Moore, 106; Osgood v. Lewis, 2 Harr. & Gill [Md.] 495, 522–527 [18 Am. Dec. 317]; Hastings v. Lovering, 2 Pick. [Mass.] 214, 220 [13 Am. Dec. 420]; Borrekins v. Bevan, 3 Rawle [Pa.] 23 [23 Am. Dec. 85]; contra, see Jendwine v. Slade, 2 Esp. R. 572; Conner v. Henderson, 15 Mass. 319 [8 Am. Dec. 103], and see Henderson v. Sevey, 2 Greenl. [2 Me.] 139."

In Hawkins v. Pemberton (1872) 51 N. Y. 198, 10 Am. Rep. 595, where a sale by auction had been made of what was assumed to be "blue vitriol," but which in fact was "mixed vitriol," after an extensive review of the authorities, it was held that the contract was unenforceable. And in the same case, in referring to the case of Chandelor v. Lopus, (1603) 2 Cr. Jac. 4, 79 English Rep. 3 (Full Reprint), upon the decision of which many of the former cases relied as an authority, in part the court said: "The doctrine [there] laid down is that a mere affirmation or representation as to the character or quality of goods sold will not constitute a warranty; and that doctrine has long since been exploded, and the case itself is no longer regarded as good law in this country or England." Citing authorities. To the same effect, see Dounce v. Dow, 64 N. Y. 411; White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13.

A case which in its facts closely resembles those in the instant case is that of Power v. Barham (1836) 4 Adol. & Ell. 473, 111 English Repts., Full Reprint, (K. B.) 865. Therein the early case of Jendwine v. Slade, 2 Espinasse, 572 (1797), to which reference hereinbefore has been had, is cited and "distinguished." The syllabus in Power v. Barham is as follows: "In assumpsit for breach of a warranty of pictures, it was proved, among other things, that the defendant, at the time of the sale, gave the following bill of parcels: 'Four pictures, Views in Venice, Canaletto. 1601'. The Judge left it to the jury upon this and the rest of the evidence, whether the defendant had contracted that the pictures were those of the artist named, or whether his name had been used merely as matter of description, or intimation of opinion, the jury found for the plaintiff, saying that the bill of parcels amounted to a warranty: Held, that the question had been rightly left to jury, and that the verdict was not to be disturbed."

An American case which in principle is clearly applicable to the facts herein is that of Sherwood v. Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531. It there appears that the subject of the sale was a "blooded" polled Angus cow that both parties to the transaction assumed was barren and hence useless as breeding stock. In such assumed conditions the owner agreed to sell and the purchaser agreed to buy the cow at the market price of beef cattle, to wit, 5½ cents per pound, or what amounted to about $80. Before the day arrived when the cow was to be delivered by the seller to the purchaser, it was discovered that the cow was with calf and consequently that the cow was worth at least $750. It was held that the owner of the cow had the right to rescind the agreement of sale. But to the contrary of such ruling on practically similar facts, see Wood v. Boynton, 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610.

In the case of Henshaw v. Robins, 9 Metc. (50 Mass.) 83, 43 Am. Dec. 367, where the authorities are reviewed, the facts and the law are indicated in the syllabus as follows: "When a bill of parcels is given, upon a sale of goods, describing the goods, or designating them by a name well understood, such bill is to be considered as a warranty that the goods sold are what they are thus described or designated to be. And this rule applies, though the goods are examined by the purchaser, at or before the sale, if they are so prepared, and present such an appearance, as to deceive skilful dealers."

Reflecting particularly upon the situation shown by the facts in the instant case, is the following language which occurs in the course of the opinion: "But we are of opinion that the examination of the article by the plaintiff, at the time of the sale, is no evidence of his intention to waive any legal right. If the spurious nature of the article might have been detected on inspection, it might have been otherwise; but we must infer, from the instruction of the court, that the jury found that the article was so disguised that the deception could not have been detected by a skilful dealer in indigo, without resorting to an analytical experiment; so that no neglect can be imputed to the plaintiff in not making a careful examination." See, also, Hecht v. Batcheller, 147 Mass. 335, 17 N. E. 651, 9 Am. St. Rep. 708.

On examination of the case of Henshaw v. Robins, supra, the similarity of the facts therein to the facts in the instant case will immediately be noted, and the language of the opinion to the effect that if "the article was so disguised that the deception could not have been detected by a skilful dealer" so closely applies to the situation in the instant case that the conclusion reached by the court in the cited case is particularly important in reaching a conclusion herein.

The governing principle of law to the effect that an article described in a "bill of parcels," or, as in the instant case, in a "bill of sale," amounts to a warranty that such article in fact conforms to such description and that the seller is bound by such description, has been applied in this state in the case of Flint v. Lyon, 4 Cal. 17, wherein it was held that where the defendant purchased an entire cargo of flour which was described as "Haxall" flour, he was not required by the contract to accept the same flour which in reality was "Gallego" flour, but which was of as excellent quality as "Haxall" flour. Therein, in part, the court said:

"What the inducement was to the defendant to purchase Haxall, we know not; but having purchased that particular brand, he was entitled to it, and could not be compelled to accept any other as a substitute. The use of the word 'Haxall' in the sale-note amounted to a warranty that the flour was Haxall. [Citing authorities.] How, then, stands the case? The contract was founded in mistake, both parties supposing they were contracting concerning a certain article which had no existence, consequently the contract was void for want of the substance of the thing contracted for. Could then the acceptance of a different article than the one sold by Gorham. the sub-vendee, conclude the defendant? Certainly not! * * *"

In principle, to the same effect, see, also, Burge v. Albany Nurseries, Inc., 176 Cal. 313, 168 P. 343; Barrios v. Pacific States Trading Co., 41 Cal. App. 637, 183 P. 236; Firth v. Richter, 49 Cal. App. 545, 196 P. 277; Rauth v. Southwest Warehouse Co., 158 Cal. 54, 109 P. 839; Brock v. Newmark G. Co., 64 Cal. App. 577, 222 P. 195; Brandenstein v. Jackling, 99 Cal. App. 438, 278 P. 880.

[1, 2] Although it may be that by some authorities a different rule may be indicated, it is the opinion of this court that, in accord with the weight of the later authorities to which attention hereinbefore has been directed, the strict rule of caveat emptor may not be applied to the facts of the instant case, but that such rule is subject to the exception thereto to the effect that on the purported sale of personal property the parties to the proposed contract are not bound where it appears that in its essence each of them is honestly mistaken or in error with reference to the identity of the subject-matter of such contract. In other words, in such circumstances, no enforceable sale has taken place. But if it may be said that a sale, with a voidable condition attached, was the outcome of the transaction in the instant case, notwithstanding the "finding of fact" by the trial court that "plaintiff made no representations and warranties as to said violins," from a consideration of the language employed by the parties in each of the documents that was exchanged between them (to which reference hereinbefore has been had), together with the general conduct of the parties, and particularly the acquiescence by plaintiff in the declaration made by defendant regarding each of the violins and by whom it was made, it becomes apparent that, in law, a warranty was given by plaintiff that one of the violins was a Guarnerius and that the other was a Stradivarius.

The findings of fact unquestionably show that each of the parties believed and assumed that one of said violins was a genuine Guarnerius and that the other was a genuine Stradivarius; the receipt given by defendant to plaintiff for said violins so described them, and the "bill of sale" given by plaintiff to defendant certifies that plaintiff "sold to Mr. Efrem Zimbalist (defendant) one Joseph Guarnerius violin and one Stradivarius violin dated 1717 for the full price of $8,000.00 on which has been paid $2,000.00. * * *"

[3] Without burdening this opinion with the citation of additional authorities, it may suffice to state that, although the very early decisions may hold to a different rule, all the more modern authorities, including many of those in California to which attention has been directed (besides the provision now contained in section 1734, Civ. Code), are agreed that the description in a bill of parcels or sale note of the thing sold amounts to a warranty on the part of the seller that the subject-matter of the sale conforms to such description. See, generally, 22 Cal. Jur. 994; 55 Cor. Jur. 738 et seq.; 24 R. C. L. 171; and authorities respectively there cited.

It is ordered that the judgment be and it is affirmed.

We concur: CONREY, P. J.; YORK, J.

SIMPSON v. CITY OF LOS ANGELES et al.*

Civ. 5254.

District Court of Appeal, Third District, California.

Nov. 21, 1934.

Hearing Granted by Supreme Court Jan. 17, 1935.

1. Municipal corporations 🔑661(2)

Ordinance prohibiting operation of vehicles on street *held* not within city's police power, where purpose was solely to permit others to beautify street and make show place thereof.

> There was no evidence that any person had ever suffered any personal injury by reason of vehicular traffic on the street, and there was no showing that the passage of the ordinance would have any relation to the public welfare or the conservation of the peace. After the passage of the ordinance the street was closed off and improved and various booths and structures were placed therein for sale of Mexican curiosities, and the street was used as a show place.

2. Municipal corporations 🔑661(2)

Where ordinance excluding vehicular traffic from street was unauthorized when passed, it was no justification for ordinance that booths and stands erected in street subsequent to and as result of passage of ordinance would render vehicular traffic hazardous, and evidence of subsequent conditions was irrelevant.

3. Municipal corporations 🔑661(2)

Provision of statute authorizing closing of streets to vehicular traffic *held* not to validate street closing ordinance adopted before effective date of statute (St. 1931, p. 2131, § 145).

4. Municipal corporations 🔑625

Ordinance which was unreasonable and outside scope of police power when passed must fall, irrespective of what private parties have established after its enactment.

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 47 P.2d 474.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Constance D. Simpson against the City of Los Angeles and others. From an adverse judgment, plaintiff appeals.

Reversed.

J. Wiseman Macdonald and Harold J. Cashin, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., F. von Schrader, Asst. City Atty., and D. M. Kitzmiller, Deputy City Atty., all of Los Angeles, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This action involves the validity of Ordinance No. 64715 (N. S.) of the city of Los Angeles, whereby section 17½ was added to General Traffic Ordinance No. 50515 (N. S.), the section added reading as follows: "It shall be unlawful for the operator of any vehicle to drive said vehicle in, out of, or upon Olvera Street between Marchessault Street and Macy Street."

The amendment, as just stated, to Ordinance No. 50515 (N. S.) became effective on the 12th day of October, 1929. The trial court upheld the validity of Ordinance No. 64715 (N. S.) amending Ordinance No. 50515 (N. S.). From this judgment the plaintiff appeals.

For many years the plaintiff has been the owner of lot "A," tract 4629, in the city of Los Angeles. This lot has a frontage of 235.32 feet on the west side of Olvera street, commencing at Marchessault street and running thence northerly. Olvera street was, at all the times herein mentioned, and ever since the 3d day of May, 1877, has been, a dedicated public street in the city of Los Angeles, and opened and used for all purposes as a public thoroughfare. Two of the buildings owned by the plaintiff situate on lot "A" have loading doors opening on Olvera street and all of the buildings have rear entrances thereon. That prior to the effective date of Ordinance No. 64715 (N. S.) plaintiff and her predecessors in interest for more than fifty years, and the tenants and lessees of the plaintiff and their customers, had used Olvera street as a means of ingress to and egress from said premises. That the court so found, and also found that access to said premises by vehicles and pedestrians over Olvera street was of value to the plaintiff. The court also found that the closing of Olvera street was of damage to the plaintiff as the owner of the lot mentioned. Olvera street is approximately 520 feet in length from its intersection with Marchessault street on the south to Macy street on the north; approximately 57 feet in width at the north and approximately 48 feet in width where it intersects Marchessault street. The direction of the street is northerly and southerly.

Appellant's property, during all the times mentioned herein, was and is improved with stores which were let and leased to tenants, to be used for business and light industry purposes, and the same are and were used for such purposes. The property along Olvera street has for many years been used for business and light manufacturing purposes. Other buildings, in addition to those belonging to the plaintiff, have loading doors opening on Olvera street.

The record likewise shows that prior to the passage of Ordinance No. 64715 (N. S.), amending Ordinance No. 50515 (N. S.), vehicular traffic on Olvera street was negligible. The vehicular use made of the street consisted principally of trucks and other vehicles conveying merchandise taken to and conveyed through the loading doors which we have mentioned opening on Olvera street, to the various premises abutting on said street. There does not appear to have been any through traffic on Olvera street, nor has it ever been used as a thoroughfare by what are usually termed "passenger automobiles," the street being used practically for the purposes which we have mentioned. Not being a regular thoroughfare for passenger automobiles, it appears from the record that prior to the passage of the ordinance referred to Olvera street had remained unimproved.

A short time previous to the passage of the ordinance which became effective October 12, 1929, the defendant Plaza de Los Angeles appears to have obtained an agreement with the owners of property having a frontage of 78.3 feet on Olvera street, being property known as the "Avila Adobe" located thereon. Following this, the defendant Christine Sterling, the secretary of the corporation just mentioned, sent the following communication to the city council of the City of Los Angeles:

"Gentlemen: At the Plaza between Main and Los Angeles streets is a short street called Olvera. It is unpaved, filthy, and unsanitary. Facing upon this street is the oldest and most historic building in this city, which in 1847 was the American headquarters and housed Commodore Stockton and General Fremont. * * * If the City Council will grant me permission to beautify Olvera street, I will convert it into one of the greatest tourist attractions this city has ever had.

I will make it a typical Spanish-Mexican street where the Mexican people in costume can sell their wares under bright-colored awnings and canopies—coffee tables out on the sidewalk—street musicians—flower markets and all of the charm and picturesqueness of Mexico and Spain. It will furnish the city with a suitable place to give fiestas and celebrate such days as September 4th, January 10th, etc. It will help to keep alive our patriotism and sentiment. Olvera street is one of the old pueblo grants so there should be no legal difficulty to such a step. I have funds available to complete the project and with the exception of a little help from the city engineer in leveling the street there would be no expense to the city. The majority of the property owners on the street are favorable to the plan and we will lease any store vacated by any tenant as a result of this improvement. All stores and shops have a large Main street entrance, so loading and unloading is not necessary on this alley.

"The whole matter can be summed up as follows: At present we have a condition which is the gutter of this city. Foul water drains down this street and rubbish is dumped upon it. No traffic goes through, but it is a parking place for trucks and cars. In exchange for this condition I offer the city a clean, picturesque Latin-American show place—a spot of beauty for us all to enjoy—a romantic place in which to preserve our history and fulfill a real Pan-American ideal.

"Very truly yours,

"[Signed.] Christine Sterling."

Our attention has not been called to just what was done with this communication, but it does appear that thereafter R. T. Dorsey, the traffic engineer of the city of Los Angeles, recommended that Olvera street should be closed to vehicular traffic, the court finding as follows: That said R. T. Dorsey recommended to the traffic and lighting committee of the city council that the closing of Olvera street to vehicular traffic was advisable from the standpoint of the regulation of vehicular travel and traffic within the central traffic district of the city of Los Angeles, and that the traffic and lighting committee recommended the adoption of the closing of Olvera street to vehicular traffic. This appears to have led to the adoption of Ordinance No. 64715 (N. S.), amending Ordinance No. 50515 (N. S.). The record does not show the recommendations just referred to, but simply the statement of the witness Dorsey, which was admitted over the plaintiff's objection, that such recommendations were made.

After the passage of Ordinance No. 64715 (N. S.), the board of public works of the city of Los Angeles granted permission to the defendant Plaza de Los Angeles, to improve Olvera street according to a plan and plat submitted for the beautification thereof. This plan appears to have been carried into effect, Olvera street was improved, and the court found that thereafter the defendant Christine Sterling and the Plaza de Los Angeles, a corporation, proceeded to grant concessions to individuals, who established booths, stands, and structures upon said street throughout most of its length, to the intent that the persons to whom said booths, stands and structures were let could and did sell goods, wares, and merchandise of various kinds, and that the booths, stands, and structures were placed upon the roadway of Olvera street, and have been used and maintained thereon for business purposes. It also appears that chains were placed and maintained at both the northerly and southerly entrances to Olvera street obstructing the ingress to, and egress therefrom, and that since the passage of the ordinance the street has been used as a place for the vending of Mexican curiosities and as a show place for the attraction and entertainment of the amusement seeking public, and also as a loitering place for the idle and those having no particular occupation save to pass away the time.

The court found in favor of the plaintiff as against the defendants Christine Sterling and the Plaza de Los Angeles, to the extent of ordering the removal of obstructions immediately in front of her premises, and also the taking down of the chains, so as to leave a space of a few feet at either entrance of Olvera street, leaving the roadway thereof otherwise obstructed.

As we have stated, the record shows that Olvera street, prior to the adoption of the ordinance in question, was seldom used for vehicular purposes, was in no sense of the word a thoroughfare for passenger automobiles, the street being used practically in connection only with the business enterprises carried on along said street, or on premises abutting on said street. While the recommendation of the traffic engineer appears to have been based upon "vehicular travel and traffic within the central traffic distance of the City of Los Angeles," no mention is made of the vehicular traffic on Olvera street. It may be here stated that the record also shows that no lives have ever been sacrificed by vehicular traffic on Olvera street, nor is there any record of any personal injuries having been inflicted by vehicular traffic on Olvera street. The basis of the city's contention upon this appeal is that, if there should be any considerable vehicular traffic on Olvera street, it would add just that much to the traffic on adjacent streets. Just how this could arise does not appear very clear, because the traffic on Olvera street must necessarily come from one of the adjacent streets running easterly and westerly. It does appear also in the record that, whatever vehicular traffic there might be upon Olvera street, if only right-hand turns were permitted thereon, no great or material burden would be added to either of the adjacent streets. By reason of the situation of Olvera street not being a through thoroughfare, it is evident that no traffic can originate on that street which does not come from traffic on adjacent streets, from which it necessarily follows that it would not add a single automobile, in numbers, passing over and using either Marchessault or Macy streets.

Before considering the contentions made by the respective counsel, it is also well to bear in mind that practically all the testimony relied upon by the respondent city is based upon a condition subsequent, and also upon the assumption that the permission of vehicular travel on Olvera street would add to the burdens now being borne by adjacent thoroughfares. This latter, of course, has no basis in fact, in view of the location of Olvera street, being such that no original traffic can emanate therefrom.

The testimony based upon a condition subsequent relates to the number of pedestrians now congregating on Olvera street. As a matter of fact Olvera street is not really used as a place of travel by pedestrians. It is in fact used, according to the records, as a place for pedestrians to congregate, view Mexican curios, purchase articles of Mexican manufacture, and enjoy somewhat the atmosphere and influence of a city south of the Rio Grande.

In determining the validity of the ordinance barring vehicular traffic on Olvera street, our inquiry must be confined to the condition of the street at the date of the adoption of the ordinance. If it were a valid police regulation at the date of its adoption, no changed condition would affect its validity. On the other hand, if it were an invalid act on the part of the city at the time of its adoption, the changed conditions testified to by the witnesses for the respondent would not give life to that which was dead timber from the beginning. As we have stated, the testimony shows that the street was unimproved; that it was not used for general vehicular traffic; that vehicular traffic was not prohibited on Olvera street by reason of any danger or peril to any one on Olvera street, by reason of the use thereof by vehicles.

The record does show that, since the conversion of Olvera street into a Mexican bazaar or show place, a large number of people do visit the premises for the purposes herein mentioned. However, the fact that the street has been converted into either a show place or a pleasure resort does not establish a legal basis for excluding the plaintiff from using the street for the purposes to which she and her tenants have been accustomed to do for a great many years.

[1] Was the passage of Ordinance No. 64715 (N. S.), which amended Ordinance No. 50515 (N. S.) by adding thereto sections 17½, a valid exercise of the police power by the city of Los Angeles?

As stated in 43 C. J., page 227: "A municipal corporation is limited in the exercise of its powers to matters local and municipal. The corporation is thus restrained from entering the field of general legislation or making declaration of public policy. In order that a municipal regulation may be sustained as an exercise of the police power, the regulation must have for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals, or general welfare. The exercise of the police power must have a substantial basis. The power cannot be made a mere pretext for legislation that does not fall within it. There must be some clear, real, and substantial connection between the assumed purposes of the regulation and the active provisions thereof, and the provisions must in some plain, appreciable, and appropriate manner tend toward the accomplishment of the object for which the power is exercised. The primary object of municipal regulations is public and not private. The police power may not be exercised for private purposes, nor for the exclusive benefit of particular individuals or classes."

There is nothing in the record which indicates that the ordinance in question was passed to prevent any manifest evil; nor was it passed for the preservation of public health, safety, morals, or general welfare. The city did not intend, and never has taken any action, to eradicate the so-called evils existing on Olvera street. The city did not at any time nor does the record show that the city ever considered the question of passing the ordinance for the purpose of preserving the health of the city. That was left entirely to the action of private parties.

The record likewise shows, that the ordinance could not have been passed for the safety of any one on Olvera street, on account of the fact that the record shows that no person had ever suffered any personal injury by reason of the vehicular traffic that had theretofore used Olvera street.

We have yet to learn that the passage of an ordinance which opens the way for the establishment of a show place on a city street is an act having for its purpose the elevation of morals or in any wise tending to promote the general welfare. Nor is there anything in the record which indicates that the passage of the ordinance in question was necessary, expedient, advisable, or otherwise called for to conserve the peace of Olvera street, or of the people living thereon, or using the same.

On the part of the respondent it is contended that the court cannot inquire into the motive actuating the legislative body in passing any particular kind of legislation. This is true, but the court can inquire into the purpose and object sought to be accomplished by any particular ordinance. There is a distinct difference in meaning between "motive" and "purpose." In 42 C. J., page 561, "motive" is defined as "an inducement, reason, cause, or incentive for the doing of an act; some cause or reason that moves the will and induces action; that condition of the mind which incites to action," etc. "Purpose" is defined in 51 C. J., page 102, as follows: "This word is derived from the Latin 'propositum,' and has been defined as meaning that which a person sets before himself as an object to be reached or accomplished; the end or aim to which the view is directed in any plan, measure or exertion", etc. What we have set forth herein all goes to show the "object to be reached or accomplished; the end or aim to which the view is directed in any plan, measure, or exertion," etc.

What was the object to be attained by excluding vehicular traffic from Olvera street? We think it is absolutely undeniable that it was simply to enable the defendants Christine Sterling and Plaza de Los Angeles to beautify Olvera street and make an attractive show place, just as exhibited by the record in this cause, and, as said in the quotation from 43 C. J., supra, such power cannot be used as a mere pretext for legislation, as it is not police regulation.

The language used in the case of Gray v. Reclamation District No. 1500, 174 Cal. 633–640, 163 P. 1024, 1032, we think applicable, to wit: "The problems do not arise from any similarity in the nature of the powers themselves. They arise in each case from the difficulty of determining whether or not the asserted exercise of the police power is but a disguise for evading the private owner's rights, with the result that his property is taken or damaged without compensation in a case where compensation is called for."

The question here is whether we are dealing with a valid exercise of the police power, or whether the act in question is not merely a thinly disguised piece of legislation, having for its purpose the accomplishment of an object entirely outside of the police powers of a city. Or, as said in 18 California Jurisprudence, page 828: "A municipality may not, by virtue of the police power alone, and for purely aesthetic purposes, limit the use which a person may make of his property."

Again, in 6 Ruling Case Law, page 236, we find the following: "The police power of the State extends only to such measures as are reasonable, and the general rule is that all police regulations must be reasonable under all circumstances. In every case it must appear that the means adopted are reasonably necessary and appropriate for the accomplishment of a legitimate object falling within the domain of the police power. A statute, to be within this power, must be reasonable in its operation upon the persons whom it affects, and not unduly oppressive. The validity of a police regulation, therefore, primarily depends on whether, under all existing circumstances, the regulation is reasonable or arbitrary, or whether it is really designed to accomplish a purpose properly falling within the scope of the police power."

Again, we may ask, what effect, so far as the city of Los Angeles was concerned in any of its actions, did the mere closing of vehicular traffic on Olvera street have in improving the sanitary condition, the peace, health, or morals of that portion of the city of Los Angeles? The answer must be negative to all these questions. Not having such object in view, what was the object? The answer to this question is found in the proceedings initiating and leading up to the passage of the ordinance involved herein. Motive is not involved, but the objects sought to be accomplished stand out clearly and distinctly.

That the court may consider the objects to be attained, we may refer to the case of Dobbins v. Los Angeles, 195 U. S. 223, 25 S. Ct. 18, 22, 49 L. Ed. 169. We quote from the opinion as follows: "It is urged that, where the exercise of legislative or municipal power is clearly within constitutional limits, the courts will not inquire into the motives which may have actuated the legislative body in passing the law or ordinance in question. Whether, when it appears that the facts would authorize the exercise of the power, the courts will restrain its exercise because of alleged wrongful motives inducing the passage of an ordinance, is not a question necessary to be determined in this case; but where the facts as to the situation and conditions are such as to establish the exercise of the police power in such manner as to oppress or discriminate against a class or an individual, the courts may consider and give weight to such purpose in considering the validity of the ordinance. This court in the case of Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220, held that, although an ordinance might be lawful upon its face, and apparently fair in its terms, yet, if it was enforced in such a manner as to work a discrimination against a part of the community, for no lawful reason, such exercise of power would be invalidated by the courts."

In the case of Ex parte Snowden, 12 Cal. App. 521, 107 P. 724, 726, the court said: "The reasonableness of a regulation such as we are here considering depends upon its purpose and the conditions requiring it to be made."

The well-considered case of Pacific Palisades Ass'n v. City of Huntington Beach, 196 Cal. 211, 237 P. 538, 540, 40 A. L. R. 782, the court said: "Every intendment is to be made in favor of the lawful exercise of municipal power making such regulations, and it is not the province of courts, except in clear cases, to interfere with the exercise of that authority. But, as was recently said by the Supreme Court of the United States, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322, 28 A. L. R. 1321. [See, also, Rose's U. S. Notes.] Therefore, notwithstanding this general grant of power, it is a thoroughly well-settled doctrine that municipal by-laws and ordinances undertaking to regulate useful business enterprises are subject to investigation in the courts, with a view to determining whether the law or ordinance is a lawful exercise of the police power; or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the right to carry on a lawful business, to make contracts, or to use and enjoy property. Dobbins v. Los Angeles, 195 U. S. 223, 25 S. Ct. 18, 49 L. Ed. 169; In re Application of Throop, 169 Cal. 93, 99, 145 P. 1029; Curtis v. City of Los Angeles, 172 Cal. 230, 234, 156 P. 462."

Here, we may again ask: Was the amending of Ordinance No. 50515 (N. S.), by adding thereto section 17½, purporting to regulate vehicular traffic on Olvera street, where there is not a scintilla of evidence to show that the vehicular traffic on said street had ever been a menace to either life or property, a real police regulation, or only a disguised act to accomplish the purpose, which the record shows was the beautifying of Olvera street and the establishment of a show place thereon?

As further showing that ordinances are not valid which really have for their object the accomplishment of said æsthetic purpose, we cite the case of In re Hall, 50 Cal. App. 786, 195 P. 975.

In Eachus v. Los Angeles, etc., Ry. Co., 103 Cal. 614, 37 P. 750, 751, 42 Am. St. Rep. 149, while an action for damages, the law set forth in the opinion we think applicable, to wit: "The right of the owner of a city lot to the use of the street adjacent thereto is property which cannot be taken from him for public use without compensation; and any act by which this right is impaired is, to that extent, a damage to his property. When a city subdivides a tract of land, of which it is the owner, into blocks and streets, and sells the same, it thereby dedicates the streets to public use, and the purchaser of one of those lots acquires an easement in the street fronting upon his lot, for the purposes of ingress and egress, which attaches to the lot, and in which he has a right of property as fully as in the lot itself." The opinion then goes on to say that such owner is entitled to compensation. Compensation, however, is not prayed for in the instant case.

And further, as to the additional rights which a property owner has in a street upon which his property abuts, we cite the case of Lane v. San Diego Electric Ry. Co., 208 Cal. 29, 280 P. 109, 111: "'An abutting owner has two kinds of rights in a highway, a public right which he enjoys in common with all other citizens, and certain private rights which arise from his ownership of property contiguous to the highway, and which are not common to the public generally; and this regardless of whether the fee of the highway is in him or not. * * * An abutting landowner on a public highway has a special right of easement and user in the public road for access purposes, and this is a property right which cannot be damaged or taken away from him without due compensation.' 29 C. J. 547; Fairchild v. Oakland & Bay Shore Ry. Co., 176 Cal. 629, 169 P. 388; Cushing-Wetmore Co. v. Gray, 152 Cal. 118, 123, 92 P. 70, 125 Am. St. Rep. 47; Smith v. Southern Pac. R. R. Co., 146 Cal. 164, 79 P. 868, 106 Am. St. Rep. 17; Eachus v. Los Angeles, etc., Ry. Co., 103 Cal. 614, 37 P. 750, 42 Am. St. Rep. 149; McLean v. Llewellyn Iron Works, 2 Cal. App. 346, 83 P. 1082, 1085. 'An abutter has a limited right to obstruct the roadway and sidewalks in a municipality by reason of his business or household exigencies, as, for example, by teams and vehicles permitted to stand in front of his property for a reasonable time. * * * And an abutting owner may use the street as for the purpose of loading and unloading goods or merchandise, or transporting his goods or other portable articles to and from his property, but such uses must be necessary and reasonable and the abutting owner cannot obstruct the street for long periods each day.' 44 C. J. 956. 'The owner of a lot abutting upon a public street has by reason of such ownership a special easement in such street for the purpose of ingress and egress which is property as fully as the lot itself.' Cushing-Wetmore Co. v. Gray, supra."

In 19 California Jurisprudence, page 55, the right of a property owner is affirmed, as follows: "The right of a citizen to travel upon a street and transport his property thereon in the ordinary course of life and business differs radically from that of one who makes the street his place of business and uses it for private gain, as in the running of a stage coach or omnibus. As to the former, the extent of legislative power is that of regulation; but as to the latter, the power is broader and the right may be wholly denied, or it may be admitted to some and denied to others because of its extraordinary character."

The respondents set forth in their brief a rather lengthy quotation from 13 Ruling Case Law, page 253. The basis, however, of that quotation depends upon a few lines at the beginning of paragraph 209, to wit: "The right to use the highways and streets for purposes of travel, however, is not an absolute and unqualified one, but may be limited and controlled by the State in the exercise of its police power, whenever necessary to provide for, and promote the safety, peace, health, morals, and general welfare of the people." The balance of the quotation is surplusage, in so far as it is not based upon one of the specifications set forth in the above quotation. We have shown that the closing of Olvera street was unnecessary for the safety of any one using the same, no one ever having been injured, and no property or personal damage having been inflicted thereon. The peace of the locality did not require the exclusion of vehicular traffic; and as to how the health and morals of the people who had been accustomed to use the street for the purposes of conveying merchandise to their stores were affected is not made to appear. Likewise, no general welfare is involved. At no time has it been made to appear, and the contrary has been established, however, that the use of automobiles upon Olvera street had never been dangerous to the general traveling public, as the general traveling public had never used the street. As we have shown, the traffic using the street cannot legitimately be said to be an added burden to either Marchessault street or Macy street, because whatever traffic passes over Olvera street relieves one or the other of said streets before it adds a burden to the other.

That the city council has no power to arbitrarily close a street to vehicular traffic and prohibit traffic thereon under the guise of police regulation, is considered and set forth very fully in the case of Haggenjos v. City of Chicago, 336 Ill. 573, 168 N. E. page 661, where it was held that the city council might regulate, but it could not prohibit the parking or stopping of automobiles on streets for legitimate purposes.

The appellant cites numerous cases to the effect that, while regulations may be adopted governing vehicular traffic, streets cannot be entirely closed so as to prohibit their use, and especially where the rights of abutting property owners are involved. Likewise, that the right to regulate does not confer the power to prohibit. Citing Barnes v. Essex County Park Commission, 86 N. J. Law, 141, 91 A. 1019, Ann. Cas. 1916E, 968; Valmont Developing Co. v. Rosser, 297 Pa. 140, 146 A. 557; Cummins et al. v. Jones et al., 79 Or. 276, 155 P. 171; Lowell v. Pendleton Auto Co., 123 Or. 383, 261 P. 415; Application of Lee, 28 Cal. App. 719, 153 P. 992. Other cases which we have examined are cited to the same effect, but need not be set forth herein.

In 44 Corpus Juris, page 931, the general rule is stated as follows: "The power to regulate does not include the power to prohibit the public use of the streets, except temporarily, as where a street is closed pending construction work; but does include the power to prohibit a private or special use." As against these cases the respondents call our attention to cases where a different rule is applied, and especially to the cases of State v. Mayo, 106 Me. 62, 75 A. 295, 299, 26 L. R. A. (N. S.) 502, 20 Ann. Cas. 512, and Commonwealth v. Kingsbury, 199 Mass. 542, 85 N. E. 848, L. R. A. 1915E, 264, 127 Am. St. Rep. 513. These cases have to do with conditions diametrically opposite to those existing at the time of the passage of the ordinance involved in this action. In the Mayo Case it appears that a public highway had been constructed along a precipitous mountainside. In considering the conditions presented the court said: "The use on such ways of the powerful, swiftly moving, and dangerous automobile must necessarily endanger all who travel thereon, and especially those who ride in carriages drawn by horses. Presumably to safeguard the people against such dangerous conditions the Legislature decided that the ordinance in question might be made."

In the Kingsbury Case the court, after reciting that automobiles being vehicles of great speed, and frightful to most horses, expressed its views as follows: "In some parts of the state, where there is but little travel, public necessity and convenience have required the construction of ways which are steep and narrow, over which it might be difficult to run an automobile, and where it would be very dangerous for the occupants if automobiles were used upon them. In such places it might be much more dangerous for travelers with horses and with vehicles of other kinds if automobiles were allowed there." These quotations show that the mind of the court was influenced by reasoning applicable to a horse-drawn vehicle age, and not to a time and place when the horse-drawn vehicle has entirely disappeared from city streets. Again, the record does not disclose that there are any dangerous or precipitous conditions on Olvera street.

[2] A résumé of the cases leads us to the conclusion that, where the conditions on a street or highway are such as to render vehicular traffic thereon hazardous to the users thereof, or to others, the police power may be reasonably exercised so as to either regulate or prohibit vehicular traffic. No such conditions are shown to have existed on Olvera street at the time of amending Ordinance No. 50515 (N. S.), by adding thereto section 17½, supra. Testimony based upon conditions existing months after the passing of the amended ordinance, to the effect that vehicular traffic would be hazardous on Olvera street while that highway is occupied by booths, stands, amusements, and alluring concessions, does not support findings necessary to a holding that the amendment to the ordinance in question was a reasonable exercise of police power. Such testimony properly and legally leads only to the conclusion that such obstruction should be immediately removed from the highway. A city cannot permit an illegal condition to be created upon a public street, and thereafter rely upon such condition to justify its unwarranted action which led to the creation of such a condition.

[3] While the right of eminent domain to condemn easements has been incidentally mentioned, that power is not involved herein; likewise, the amendment to section 145 of the California Vehicle Act (St. 1923, p. 563), which became effective August 14, 1931 (St. 1931, p. 2131), reading: "And may close any street or highway to vehicular traffic when in the opinion of such legislative bodies such street or highway is no longer needed for vehicular traffic," etc., called to our attention, can have no bearing upon the decision of this cause, for the simple reason that the effective date of the amendment is approximately two years later than the date of the adoption of the amendment to Ordinance No. 50515 (N. S.) of the city of Los Angeles. Even if such amendment were effective, it would be necessary for the conditions preceding the closing of the street to be such as to show the use of the street was no longer needed. We do not decide, though urged by counsel, that this would prevent the absolute closing of a street so as to bar the use thereof by abutting owners, such as is shown to have existed in the instant case preceding the action taken by the city council of the city of Los Angeles.

[4] We have not reviewed the testimony of the respondents at length for the simple reason that an examination thereof shows that it is all based upon conditions subsequent and conditions allowed to be created after the amendment to Ordinance No. 50515 (N. S.) was adopted. All of this testimony is entirely irrelevant and cannot be relied upon to sustain the reasonableness of the ordinance in question. If the conditions existing at the time of the passage of the ordinance show it to be unreasonable, and the objects to be attained not within the purview of legitimate police regulations, the ordinance must fall, irrespective of what private parties have established after its enactment. We may add that the testimony of the traffic engineer of the city of Los Angeles shows that vehicular traffic on Olvera street might be reasonably

regulated if the objectionable structures existing thereon were removed.

Without further review of the cases cited, we think it necessarily follows from what we have said, and what is shown by the record, that the attempted amendment of Ordinance No. 50515 (N. S.) by adding thereto section 17½, supra, was beyond the reasonable exercise of the police powers of the city of Los Angeles, and must therefore be held, and is hereby held, to be absolutely void.

The judgment of the trial court is reversed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

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2 Cal.App.2d 513

KELLER v. PACIFIC TELEPHONE & TELEGRAPH CO.

Civ. 5075.

District Court of Appeal, Third District, California.

Dec. 1, 1934.

Rehearing Denied Dec. 31, 1934.

Hearing Denied by Supreme Court Jan. 28, 1935.

1. Telegraphs and telephones ⇨20(7)

In action for death of motorist occurring when automobile backed into telephone pole and pole broke, where pole was decayed to depth of 1½ inches, though remainder was not decayed, question of telephone company's negligence in maintaining defective pole *held* for jury.

2. Telegraphs and telephones ⇨15(3)

Telephone company must make reasonable inspection of its poles to ascertain that they are safe so as to withstand ordinary strain of weather conditions or other ordinary tests of strength.

3. Automobiles ⇨12

Statute prohibiting person in charge of motor vehicle from allowing vehicle to stand on public highway "unattended" without first setting brakes and stopping motor applies only to person who leaves automobile parked without an occupant (St. 1923, p. 562, § 137).

4. Telegraphs and telephones ⇨20(7)

Where deceased placed gear lever in neutral position when he left his automobile for few moments and, in his absence, his wife, so as to get out of car more easily, placed gear into reverse position, whether deceased on his return was contributorily negligent in cranking motor without examining gear lever, so as to preclude recovery against telephone company for his death occurring when automobile backed into telephone pole which broke and killed deceased, *held* for jury.

5. Telegraphs and telephones ⇨20(8)
Trial ⇨194(16)

In action for death of motorist when automobile backed into decayed telephone pole which broke and killed motorist, where gist of telephone company's alleged liability was maintenance of decayed and dangerous telephone pole, instruction that mere fact that company had erected and maintained the pole did not mean that it was negligent and did not entitle plaintiff to recover *held* erroneous and misleading and invaded jury's province.

6. Appeal and error ⇨1066
Telegraphs and telephones ⇨20(8)

Where decedent left automobile in charge of wife and another when he left, and such persons departed in his absence, and upon his return he cranked car, which thereupon backed into pole and pole broke and killed deceased, instruction that under statute there could be no recovery if decedent permitted automobile to stand on street without first setting brakes *held* erroneous and misleading and prejudicial, since statute was inapplicable because decedent did not leave automobile "unattended" (St. 1923, p. 562, § 137).

7. Negligence ⇨68

Under contributory negligence doctrine, only such acts or omissions as amount to absence of ordinary care preclude plaintiff from recovering damages.

8. Telegraphs and telephones ⇨20(8)
Trial ⇨194(16)

In action for death occurring when automobile, after being cranked by motorist, backed into pole which broke and fell on motorist, instruction that motorist was contributorily negligent and that there could be no recovery if he allowed automobile to collide with pole *held* erroneous in not informing jury that such conduct, to bar recovery, must have amounted to negligence, and as invading jury's province to determine whether striking of pole by automobile was due to deceased's fault.

9. Telegraphs and telephones ⇨20(8)

In action for death occurring when automobile, after being cranked by motorist, backed into pole which broke and fell on motorist, instruction that presumption of ordinary care was dispelled if reasonably prudent person would not have cranked engine while gear lever was in reverse position *held* erroneous in not submitting question whether motorist's ignorance of fact that gear lever had been changed by another from neutral position to reverse was excusable (Code Civ. Proc. § 1963, subd. 4).

10. Appeal and error ⚷1064(1)
Telegraphs and telephones ⚷20(8)

In action for death occurring when automobile backed across street into pole which broke and fell on motorist, where uncontradicted evidence showed that gear lever had been placed in reverse position in motorist's absence and that car started to back when motor was cranked by motorist, res ipsa loquitur doctrine *held* inapplicable to motorist's conduct, so that instruction that deceased was prima facie negligent if backing of automobile onto sidewalk would not ordinarily have happened if decedent had used proper care was misleading and prejudicial.

11. Negligence ⚷121(2)

"Res ipsa loquitur doctrine" is applicable only in absence of actual knowledge of how accident occurred, and in such case casts burden of furnishing explanation of cause on him who has exclusive control of the instrumentality.

[Ed. Note.—For other definitions of "Res Ipsa Loquitur," see Words & Phrases.]

12. Trial ⚷253(4, 9)

Where deceased, not knowing that gear lever of automobile was in reverse position, cranked motor, and car thereupon backed into pole which broke and killed deceased, instruction that if deceased caused or permitted automobile to go on sidewalk such act was presumptive evidence of his negligence *held* erroneous as omitting element of negligence, or misleading since contrary to undisputed evidence that deceased used best effort to prevent car from running onto sidewalk against pole.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action by John J. Keller, as administrator of the estate of Joseph Dempsey, deceased, against the Pacific Telephone & Telegraph Company. Judgment for defendant, and plaintiff appeals.

Reversed and remanded for a new trial.

Hearing denied by Supreme Court; SHENK and THOMPSON, JJ., dissenting.

H. L. Preston and Frank W. Taft, both of Ukiah, for appellant.

Pillsbury, Madison & Sutro, of San Francisco, and Hale McCowen, Jr., of Ukiah (Alfred Sutro and Samuel L. Wright, both of San Francisco, of counsel), for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a judgment rendered against him in accordance with the verdict of a jury which was returned in a suit for damages for the death of Joseph Dempsey as the result of alleged negligence on the part of the defendant in maintaining a defective telephone pole which broke and killed Mr. Dempsey when his automobile backed across a street and ran into the pole. It is asserted the instructions which were given to the jury were prejudicially erroneous.

The telephone company erected and maintained in the sidewalk space, 10 inches from the curbing of a street in Willits, a square-sawed 9-inch telephone pole 25 feet in height. This pole was erected by the company in 1924, but it had been previously used, although the evidence does not show how old it was. The outer portion of the pole was decayed near the ground. The evidence indicates that it still contained about 6 inches of firm timber on the inside of the pole. It was equipped with cross-arms and carried several insulated wires. Apparently it was braced in the usual manner by means of guy wires.

At 8 o'clock in the evening of October 8, 1932, the deceased parked his Chevrolet roadster on the opposite side of Central street from the point where the defective pole stood and about 90 feet distant therefrom. The street, which was 54 feet in width, was surfaced with the crown about 8 inches higher than the lowest point adjacent to the pole. The curbing at that point was only about 4 inches high. Seated by the side of Mr. Dempsey, at the time he parked his car, were his wife and Mrs. White. Dempsey stopped for a brief business interview with a man who lived in that vicinity on Central street. He expected to be absent from the car but a few moments. He shut off his engine, shifted the lever to neutral gearing, and got out, leaving his wife and Mrs. White seated in the car. After he left, the ladies got out of the machine and went to the house of Mrs. White, which was near by. Mrs. Dempsey sat in the middle of the front seat, with a knee on either side of the gear lever. When she left the machine she threw the clutch into reverse gearing, so that she could get out more easily. The battery of this car was weak. It was necessary to use the crank to start the engine. For the sake of convenience, the crank was left on the floor of the car near the lever. It was dark. When Dempsey came back the ladies had not yet returned. He was not aware of the fact that his wife had shifted the gear lever from neutral, where he left it, to reverse. He reached into the car, and securing the crank, he went to the front of the machine, and proceeded to start the engine by cranking it. The car immediately started to back away from him. He ran after it, and jumping on the running board, tried to shift the lever back to neutral. Whether he succeeded in doing so is doubtful. The machine continued to run backward in an arc toward the opposite side of the street. The rear end struck the defective pole, breaking it off near the ground and at another point toward the top of the pole. A part of the pole fell across the machine, striking Mr. Dempsey and killing him. The only substantial damage which was done to the machine was that the spare tire was broken from the frame to which it was attached at the rear end.

Upon proceedings duly had, an administrator of the estate of Joseph Dempsey was appointed and qualified. This suit for damages was brought by the administrator against the telephone company for negligence in maintaining the defective pole. The suit was tried with a jury which returned a verdict against the plaintiff. A judgment was rendered accordingly. From that judgment the administrator has appealed.

It is contended by the appellant that he was not accorded an impartial trial for the reason that the court gave to the jury several prejudicially erroneous instructions. The respondent asserts that the giving of erroneous instructions was immaterial because its motion for a nonsuit should have been granted for the reasons that there is no substantial evidence of its negligence in maintaining the telephone pole in question, and because the deceased was guilty of contributory negligence, as a matter of law, in cranking his machine without first examining to ascertain that the gear lever was not safely placed in neutral, and by failing to set his brakes when he parked his car, as required by section 137 of the California Vehicle Act (St. 1923, p. 562).

[1, 2] We are of the opinion that the question of negligence on the part of the defendant, for maintaining the defective telephone pole under the circumstances of this case, was a problem which was properly submitted to the jury for determination. It was an old pole which was evidently badly deteriorated. In spite of the fact that it still contained 6 inches of sound timber nearest the center, it was decayed at the surface, near the ground, to a depth of 1½ inches. The evidence shows that the point of a pick was thrust into the pole, at that point, to that depth. The question as to whether a reasonable person should have anticipated under such circumstances that the pole was in a dangerous condition was a proper problem for the consideration of the jury.

The defendant is not charged with negligence in maintaining the pole at an improper position in the sidewalk space. The particular charge is that it maintained a defective pole which it should have anticipated would be likely to endanger persons or property. It has been held that it is the duty of a telephone company to select and maintain sound poles which may be reasonably expected to withstand ordinary strain of weather conditions or other ordinary tests of strength, and to that end it is the duty of such companies to make reasonable inspection of its poles to ascertain that they are safe. 8 Thompson's Comm. on Neg. p. 185, § 1241. In the present case it appears that the surface of the pole in question was rotted at and near the point where it entered the ground, to a depth of approximately 1½ inches. It still contained about 6 inches of timber at the center which were not decayed. It may, however, be a legitimate question to submit to a jury, as to whether the interior timber of a pole which is so rotted at the surface may not also be deteriorated and weakened thereby to such an extent that it is more brittle and dangerous on that account. We are of the opinion that it is a proper question to submit to the jury as to whether the pole would have broken as a result of the blow received from the automobile under the circumstances of this case, if it had been reasonably sound throughout.

[3, 4] We are also of the opinion the evidence fails to show that Mr. Dempsey was guilty of contributory negligence at a matter of law. He did not violate section 137 of the California Vehicle Act. That section reads: "No person having control or charge of a motor vehicle shall allow such vehicle to stand on any public highway *unattended* without first effectively setting the brakes thereon and stopping the motor of said vehicle."

This section applies only to persons who leave their automobiles parked without an occupant therein. It is only the machine which is left *unattended* that is required to have the brakes effectively set. When Mr. Dempsey left his machine, he shifted the gear lever into neutral, turned off his engine, and went on a brief mission, leaving his wife and Mrs. White sitting in the machine. It may therefore not be said that he violated the provisions of section 137 of the California Vehicle Act. Nor may it be said, as a matter of law, that he was guilty of contributory negligence in cranking the engine, under the circumstances of this case, without first examining the apparatus to ascertain that the clutch was safely shifted into neutral. He carefully placed the clutch in neutral when he left the car, from which he was absent only a few moments. He was not aware of the fact that his wife had afterwards shifted the clutch to reverse when she got out of the car. She did not see him after he left the machine and consequently had no opportunity to tell him she had done so. It is a question for the jury to determine whether, as a reasonable person, he should have anticipated that some one might have changed the clutch from neutral to reverse during the brief period of time in which he was absent. The ladies were not there when he returned. It was dark and he evidently could not see the position of the lever as he reached into the car for the crank which he had left on the floor near the clutch. It certainly would have been fortunate if he had taken the precaution to examine the clutch before he proceeded to crank the engine. But under the circumstances of this case we are not prepared to hold, as a matter of law, that the exercise of reasonable caution would have required him to do so. It does not seem unreasonable that he should have assumed that the clutch remained in the same position in which he left it a few moments before he cranked the engine. His conduct in that respect was therefore also properly submitted to the jury for determination. It follows that the motion for a nonsuit was properly denied.

We have carefully examined the entire charge to the jury, and we are impelled to hold that it contains several reversible instructions.

This case illustrates the difficult task with which a trial judge is frequently confronted requiring him while the trial is proceeding to pass upon a large number of instructions which have been handed to him shortly before the case goes to the jury. The ideal instructions should be clear, concise, and free from argumentation. Nearly eighty instructions were given to the jury in this case. Each side offered approximately the same number of instructions. Three or four of the instructions which were given to the jury at the request of the defendant appear to belong to that class which have been frequently condemned as "formula" instructions. In the case of Douglas v. Southern Pacific Co., 203 Cal. 390, 264 P. 237, 238, the Supreme Court said in that regard: "The authorities are legion to the effect that a so-called 'formula' instruction must contain all the elements essential to a recovery, and the absence of any one of such elements may not be compensated for nor cured by a reference thereto in other instructions correctly and fully stating the law."

To the same effect are the following authorities: Ebrite v. Crawford, 215 Cal. 724, 729, 12 P.(2d) 937; Jordan v. Great Western Motorways, 213 Cal. 606, 2 P.(2d) 786; Elsey v. Domecq, 114 Cal. App. 42, 51, 299 P. 794; Queirolo v. Pacific Gas & Elec. Co., 114 Cal. App. 610, 300 P. 487; Dodds v. Gifford, 127 Cal. App. 629, 634, 16 P.(2d) 279; Bartolini v. Andrioli, 123 Cal. App. 350, 11 P.(2d) 66.

The appellant assigns seven of the instructions which were given to the jury at the request of the defendant, as prejudicially erroneous. Several of these challenged instructions were reread to the jury, at its request for further instruction on the subject of contributory negligence. This request was made some time after the jury first retired to deliberate on its verdict. Contributory negligence was the only subject upon which the jury desired further instructions. After receiving that final charge, the jury retired for further deliberation and later returned a verdict in favor of the defendant. It therefore seems probable that the jury was prejudiced by these very erroneous instructions on the subject of contributory negligence.

[5] Defendant's instruction No. 28 invades the province of the jury as the sole judges of the weight and sufficiency of the evidence. It is misleading and erroneous. It reads as follows: "The mere fact that the defendant erected and maintained *the pole involved in this case*, does not mean that the defendant is negligent, and does not entitle the plaintiff to recover damages from the defendant."

The very gist of the liability of the defendant, if any such liability does exist in this case, is the maintaining of an alleged decayed and dangerous telephone pole. The vital question for the jury to determine was whether the defendant knowingly maintained a pole in such decayed and weakened condition that a reasonably prudent person should have known it was dangerous to persons or property. But in effect the jury was told in this instruction that the maintaining of this very pole in the condition in which it existed at the time of the accident, as a matter of fact, did not constitute negligence, and therefore did not entitle the plaintiff to recover damages. It was equivalent to informing the jury that the evidence is insufficient to support the plaintiff's charge of negligence. Sullivan v. Market Street Ry. Co., 136 Cal. 479, 69 P. 143. This was an invasion of the province of the jury.

[6] Defendant's instruction No. 30, which was given to the jury, has no application to the facts of this case, since the deceased did not leave his automobile parked on the street "unattended," but on the contrary he left it in charge of his wife and another lady who were seated in the machine at the time he went away. The instruction is therefore inapplicable, misleading, and prejudicial. It reads: "I instruct you that the Vehicle Act of this state, in force at the time of this accident, provided that 'no person having control or charge of a motor vehicle shall allow such vehicle to stand on any public highway *unattended* without first effectively setting the brakes thereon and stopping the motor of said vehicle'. If you find from the evidence that the decedent allowed this automobile to stand on Central street without either first effectively setting the brakes thereon or stopping the motor of said vehicle, and that such omission proximately contributed to his death, then your verdict must be for the defendant."

This is one of the instructions which was read to the jury at their request, the second time. Since the brake was not set when the deceased left his automobile parked at the side of the street, the jury must have gained the impression from this instruction that he was therefore necessarily guilty of contributory negligence in failing to set his brake in violation of the statute and that, since the machine would probably not have backed across the street when it was cranked, if the brake had been set, this omission on his part was absolutely fatal to plaintiff's right to recover. The evidence is uncontradicted that he did not leave the machine "unattended." The law therefore did not require him to set the brake, when he left the machine. The court definitely informed the jury that if the deceased allowed his automobile to stand on Central street without effectively setting the brakes and if that omission contributed to his accident, the plaintiff absolutely could not recover damages, and their verdict must be in favor of the defendant. The statute had no application to the undisputed facts of this case. It should not have been given to the jury. It was twice read to the jury and must have been a persuasive reason for them to have decided that the deceased was thus guilty of such contributory negligence as precluded the plaintiff from recovering a judgment. It was prejudicially erroneous.

[7] In defendant's instruction No. 32, the court charged the jury that if they found that the deceased cranked his engine without first ascertaining that the gear lever was in a neutral position, and that an ordinarily prudent man would not have done so without that precaution, or "*that any other conduct or omission* of decedent proximately contributed to his injury," then their verdict must be in favor of the defendant. We may assume the preceding italicized language was inadvertently used. But it is unfortunate for the reason that it informs the jury that *any* omission of the deceased which contributed to his accident is fatal to the plaintiff's right to recover, whether it amounts to negligence or not. Of course, it is only the omission of such acts as would amount to negligence, or the lack of ordinary care, that would defeat plaintiff's right of recovery on the ground of contributory negligence. This instruction served to emphasize the error which was contained in instruction No. 30. It is only such acts as amount to an absence of ordinary care which will preclude a plaintiff from recovering damages on the doctrine of contributory negligence. 19 Cal. Jur. p. 648, § 77.

[8] Defendant's instruction No. 37, which was given to the jury, is a defective formula charge which is misleading. It reads: "If you find that the decedent drove the automobile involved in this case against the pole involved in this case, or allowed said automobile to collide with said pole and thus caused the pole to break and fall, and if you also find that said pole was located in such manner and at such point in the public highway as not to incommode the public use of such road or highway, then I instruct you that as a matter of law the decedent was contributorily negligent and if such negligence proximately caused his death, your verdict must be for the defendant."

The preceding instruction omits any reference to the question of whether the pole was dangerously decayed or defective. The chief defect in this instruction, however, is that it informs the jury that if the deceased "allowed said automobile to collide with said pole," he was guilty of contributory negligence which precludes the plaintiff's right of recovery. It omits the element of negligence. It fails to inform the jury that the conduct of the deceased which resulted in his machine colliding with the pole must have amounted to negligence on his part, in order to defeat his right to damages on the ground of contributory negligence. The language of this instruction is peculiarly unfortunate since the undisputed evidence is that the deceased was actually present and apparently he was using his best efforts to stop the runaway car and prevent it from hitting the pole. This instruction also invades the exclusive right of the jury to determine whether the striking of the pole by the automobile was due to the fault of the deceased.

[9] Defendant's instruction No. 39 is another defective formula instruction. After quoting the principle announced in section 1963, subd. 4, of the Code of Civil Procedure, that it is presumed "a person takes ordinary care of his own concerns," the instruction asserts this presumption will be effectively dispelled if the jury should find that the deceased cranked his engine while the gear lever was in reverse, if a reasonably prudent person would not have so cranked the engine. This instruction fails to refer to the plaintiff's theory that the deceased was ignorant of the fact that his gear lever had been changed from neutral to the reverse. The jury should have been given the opportunity to pass upon whether his ignorance of that fact was excusable or not under the circumstances of this case. That privilege was denied the jury by the terms of this instruction. It is therefore erroneous.

[10, 11] The defendant's instruction No. 40, with relation to the doctrine of res ipsa loquitur, is inapplicable to the facts of this case, and should not have been given to the jury. It is misleading and must have been prejudicial. It reads: "There is a rule of law known as res ipsa loquitur, which translated literally means 'The thing speaks for itself.' This rule means that when the thing which caused the injury is shown to have been under the management and exclusive control of the person operating it, and the accident is such as in the ordinary course of things does not happen if those who have the management and control use proper care, it affords reasonable evidence, in the absence of explanation by the person using it, that the accident arose from want of ordinary care upon the part of the person using it; and I instruct you that if you find that the decedent, while driving or operating his automobile, caused or permitted the same to run upon the sidewalk, and this would not have happened in the ordinary course of things if the decedent used proper care, the doctrine of res ipsa loquitur is applicable to this case, and that the decedent's act was prima facie negligent."

The doctrine of res ipsa loquitur is applicable only in the absence of actual knowledge of just how an accident occurs. It then casts the burden of furnishing an explanation of the cause upon him who has the exclusive control of the machine and who is therefore presumed to be better qualified to furnish the necessary evidence of the cause of the accident.

The application of the doctrine of res ipsa loquitur was explained in the case of Jianou v. Pickwick Stages System, 111 Cal. App. 754, 296 P. 108, 109, as follows: "It is the established rule that one who relies upon the doctrine of res ipsa loquitur to establish a cause based upon negligence must allege merely general acts of negligence. Upon the contrary, when one alleges specific acts of negligence upon which he relies, the pleading refutes the theory of res ipsa loquitur. The very hypothesis of the doctrine is that the plaintiff has no knowledge of just what caused the accident, and that, since the instrumentality by means of which the accident occurred is solely within the control of the defendant, negligence will be inferred upon proof of a prima facie case, in the absence of an adequate explanation on the part of the defendant exempting him from liability. Connor v. Atchison, T. & S. F. Ry. Co., 189 Cal. 1, 26 A. L. R. 1462, 207 P. 378; Ingledue v. Davidson, 102 Cal. App. 697, 283 P. 837; 19 Cal. Jur. 713, § 127."

We may assume the same principle will apply when a defendant under similar circumstances seeks to defeat a liability against himself on the ground that the plaintiff is guilty of contributory negligence, the nature of which is unknown to the defendant.

In the present case both the answer of the defendant and the uncontradicted evidence shows exactly what caused the automobile to back across the street and run into the pole. The doctrine of res ipsa loquitur is therefore inapplicable to the circumstances of this case. Moreover, this instruction improperly informed the jury that if it found that the deceased "caused or permitted" his automobile "to run upon the sidewalk," and that that result "would not have happened in the ordinary course of things," this would constitute a prima facie showing of negligence on the part of the deceased. It is apparent that the doing of a certain thing or permitting it to be done in an unusual manner or "out of the ordinary course of things," neither invokes the doctrine of res ipsa loquitur nor renders the person guilty of negligence even to a prima facie degree. Merely because an act is performed in an unusual way does not necessarily mean that no one but the performer knows how it is done. Moreover, in attempting to apply the doctrine of res ipsa loquitur to the facts of this case, the defendant failed to instruct the jury that if the actual cause of the accident did appear in evidence, then this doctrine would not apply, and under such circumstances the decedent would not be prima facie guilty of contributory negligence. The evil of this omission is apparent from the fact that the evidence conclusively shows there was no mystery regarding the cause of the automobile's unexpected journey across the street into the telephone pole. It was because the clutch had been shifted to reverse gear. Clearly this instruction was inapplicable to the facts of the case, and should not have been given.

[12] Defendant's instruction No. 41 is based on the theory that the deceased voluntarily permitted his automobile to run on to the sidewalk space and strike the pole, which is contrary to the undisputed evidence. It is not applicable to the evidence in this case and it is therefore misleading and erroneous. It reads as follows: "If you find from the evidence in this case *that the decedent caused or permitted* his automobile to go upon the sidewalk of Central street, then I instruct you that such an act of decedent is presumptive evidence of his negligence."

If it was intended by this instruction to inform the jury that a failure to reasonably inspect the condition of the gear lever before cranking the machine would be equivalent to "permitting his automobile to run upon the sidewalk" and therefore this omission would amount to presumptive negligence the hypothetical statement of facts is fatally defective in omitting all reference to any purported *negligent* acts. This is really an erroneous formula instruction which invades the province of the jury as the sole judges of the weight and sufficiency of the evidence. If it does not contemplate these alleged negligent omissions, it is contrary to the undisputed evidence that the deceased used his best effort to prevent the machine from running on to the sidewalk against the pole.

The judgment is reversed, and the cause is remanded for a new trial.

We concur: PULLEN, P. J.; PLUMMER, J.

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2 Cal.App.2d 459

GOSS v. SECURITY INS. CO. OF CALIFORNIA.

Civ. 9197.

District Court of Appeal, First District, Division 1, California.

Nov. 28, 1934.

Rehearing Denied Dec. 28, 1934.

Hearing Denied by Supreme Court Jan. 25, 1935.

1. Appeal and error ⚿1099(4)

Decision on first appeal that automobile liability policy was in effect when accident occurred became the law of case unless change in pleadings and issues in second trial took case out of such rule (St. 1919, p. 776).

2. Appeal and error ⚿1099(4)

Decision on first appeal that automobile liability policy was in effect when accident occurred *held* not res judicata of new issue in second trial whether policy was obtained by fraud (St. 1919, p. 776).

3. Insurance ⚿539(1)

Insured, under automobile liability policy, *held* required to notify insurer of accident upon learning thereof, even in absence of inquiry; it being immaterial that insurer made inquiry of insurance broker and not of insured, since broker was agent of insured (St. 1919, p. 776).

4. Insurance ⚿390

Insurer, which knew facts constituting defense of fraud in obtaining automobile liability policy for more than five years before injured party brought action thereon and for more than nine years before it set up defense in second trial of action, and had conducted audit of insured's pay roll, thus recognizing that policy was in force at time of accident, *held* estopped to urge such defense (St. 1919, p. 776).

◆

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Jack Goss, a minor, by Fred Goss, his guardian, against the Security Insurance Company of California. From a judgment for defendant, plaintiff appeals.

Reversed.

Hearing denied by Supreme Court; SHENK, J., dissenting.

Colding, Hale, Crawford & Myers, of San Francisco, for appellant.

Cooley, Crowley & Supple, of San Francisco, for respondent.

⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

JOHNSTON, Justice pro tem.

This is an appeal by plaintiff from an adverse judgment in an action against respondent insurance carrier on a policy of automobile liability insurance. Respondent had issued its policy to Pacific Motor Company, indemnifying it against damages inflicted by it by reason of the operation of motor vehicles. Appellant brought suit and recovered judgment against Pacific Motor Company for damages for personal injuries, and this judgment was later affirmed. Goss v. Pacific Motor Co., 85 Cal. App. 455, 259 P. 455. Execution was issued and returned unsatisfied except as to a small part of the judgment, and appellant brought action against the respondent under the provisions of the act relating to actions against insurance carriers when the insured is bankrupt or insolvent. Stats. 1919, c. 367, p. 776.

On February 14, 1928, the present action was instituted. Judgment went for respondent, but was reversed (Goss v. Security Insurance Co., 113 Cal. App. 577, 298 P. 860), and the instant appeal is from the judgment on the second trial.

The facts surrounding the issuance of the policy are as follows: On December 22, 1922, K. Nakabayashi, an insurance broker, part owner of and doing business as E. T. Arima Company, called on Swett & Crawford, insurance underwriters, for information regarding a policy of liability insurance for three Japanese operating a garage as Pacific Motor Company. The policy was not the ordinary policy, since it would insure any automobile operated by the insured and the exact amount of premium could be determined only after an audit held at the expiration of a year. On December 23, 1922, Nakabayashi wrote to Swett & Crawford asking for the issuance of the policy to be dated from December 23, 1922, but this letter was not received until December 27, at which time the underwriters phoned the broker asking him if any accident had occurred between the 23d and 27th. Upon receiving a negative answer, the application was approved on the 27th and the respondent's policy issued and dated on the 28th, covering, however, the period from December 23, 1922, to December 23, 1923.

In the meantime, and on December 26, the accident occurred out of which appellant recovered his judgment for personal injuries. One of the insured, Fujii, learned of the accident on the 26th. On the 30th, notice of the accident was communicated to the respondent, and on January 22, 1923, the appellant instituted action against Pacific Motor Company, and subsequently recovered judgment. Execution issued in the action of appellant against Pacific Motor Company and was returned partially satisfied. It then appeared that Pacific Motor Company had no additional assets, and under the provisions of the act of 1919, heretofore mentioned, the present action was instituted against the defendant, Security Insurance Company. A trial was had, and judgment was given in favor of the said Security Insurance Company. An appeal was taken by plaintiff, Goss, and this court reversed the judgment of the trial court.

[1, 2] In reversing the judgment, the appellate court held that the policy was in effect from December 23, 1922, and hence covered the accident, and also held against respondent on all other points raised. The decision became the law of the case, and is conclusive that the policy went into effect on December 23, 1922, and covered the accident, unless the change in the pleadings and issues hereinafter referred to, takes this case out of the general rule.

On February 18, 1932, after this case was set for the second trial, respondent filed an amendment to its answer setting up the defense of fraud or concealment in obtaining the policy. This defense was based on the fact that insured did not notify respondent of the happening of the accident to plaintiff on December 26, 1922.

This issue was new, was not passed upon at the first trial, and is not foreclosed by the reversal of the former judgment in this case.

[3] The testimony is uncontradicted that one of the insured, Fujii, knew of the accident on the 26th, and it thereupon became his duty to notify defendant, even in the absence of inquiry. General Acc., etc., Corp. v. Industrial Acc. Comm., 196 Cal. 179, 237 P. 33.

The fact that the inquiry was made of Nakabayashi and not of Fujii would make no difference, since under the circumstances of the instant case Nakabayashi was the agent of the insured. Solomon v. Federal Ins. Co., 176 Cal. 133, 167 P. 859, and cases cited.

The above, however, does not dispose of the case. Appellant claims that respondent is estopped to set up the defense of fraud because of certain acts, and that, further, the defense is barred both by laches and the statute of limitations.

Respondent claims and the trial court found (finding No. 10) that it did not discover the facts constituting the fraud until December, 1931. This finding is based on testimony that the copy of the daily report covering the policy was misfiled by respondent and was lost until December, 1931, when the witness

Bern accidentally discovered it in another file belonging to the respondent.

This finding is unsupported by the evidence. The policy was issued on December 28, 1922, and the daily report was made at that time. On December 30, 1922, two days later, the respondent received a report of the accident which occurred on the 26th. It had all the information relative to the issuance of the policy before it at that time, and knew, or what is equivalent, in the exercise of ordinary diligence, should have known, all the facts on which it now bases its defense. Pellon v. Connecticut Gen. Life Ins. Co., 105 Vt. 508, 168 A. 701.

Furthermore, on December 28, 1923, a year later, an audit was made by respondent of the pay roll of insured under the terms of the policy to determine the amount of premium due, and this audit covered the period from December 23, 1922, to December 23, 1923, and respondent charged for and collected the premium for that period, thus recognizing that the policy was in force at the time of the accident.

[4] Respondent knew for more than five years before this present action was filed, and for more than nine years before it set up the defense of fraud, all the facts constituting its defense. It tried the case once without raising the issue of fraud, obtained judgment, had it reversed and it was not until the second trial was ready to proceed that it raised the question of fraud. By its audit conducted a year after the accident, it recognized that the policy was in force from December 23, 1922. Under such circumstances it would seem that it is now estopped to urge that defense.

The judgment is reversed.

We concur: TYLER, P. J.; CASHIN, J.

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2 Cal.App.2d 406

HITCH v. SUPERIOR COURT OF VENTURA COUNTY et al.

Civ. 10028.

District Court of Appeal, Second District, Division 2, California.
Nov. 26, 1934.

1. Mandamus 🔑10

Writ of mandamus will lie only when there is a clear legal right to be enforced as well as a clear legal duty to be performed by court, and when there is no other remedy.

2. Mandamus 🔑154(4)

Mandamus to compel court to set case for trial would not be granted in absence of averment showing service and filing of memorandum stating that cause was at issue (Code Civ. Proc. § 594; Rules of the Superior Courts 1929, rule I).

3. Mandamus 🔑7

Exercise of jurisdiction in mandamus proceeding is to considerable extent in sound discretion of court.

4. Mandamus 🔑31

Mandamus to compel trial of divorce suit would be denied, where plaintiff in effect abandoned suit after apparent reconciliation, and subsequently filed suit for separate maintenance on which she went to trial on complaint and cross-complaint for divorce and in which issues were fully determined (Code Civ. Proc. § 594).

5. Mandamus 🔑31

Mandamus to compel trial of divorce suit would not be granted where plaintiff in effect abandoned suit, after apparent reconciliation, and later filed suit for separate maintenance, which had been heard on merits, notwithstanding her intermediate commitment to state insane hospital, which did not render her incompetent to carry on litigation (Code Civ. Proc. § 594; Pol. Code, §§ 2168–2172, 2189).

Proceeding by Charles Hitch, as guardian ad litem for Lucy Bays, an insane person, against the Superior Court of Ventura County and another, for a writ of mandate. On demurrer to the petition.

Alternative writ dismissed, and peremptory writ denied.

Buel R. Wood, of Los Angeles, for petitioner.

James C. Hollingsworth, of Ventura, for respondents.

WILLIS, Justice pro tem.

This is a proceeding in mandamus to compel the respondent superior court to set a divorce case for trial. In September, 1932, one Lucy Bays filed an action for divorce on the ground of extreme cruelty. Defendant therein answered joining issues on the complaint, and as part thereof added his cross-complaint seeking divorce on the same ground. No answer has been filed to the cross-complaint, and no allegation is made that default has been entered for failure to answer the same.

In November of 1932, under sections 2168 to 2172, inclusive, of the Political Code, respondent court committed Lucy Bays to the state hospital as an insane person. Some three months later she was released from the hospital on parole in custody of her husband, with whom she resumed marital relations. No discharge as provided in section 2189 of the Political Code has ever been issued and filed. In May of 1934, Lucy Bays commenced another action against her husband for separate maintenance, numbered 17816, to which he answered and filed his cross-complaint for divorce, therein alleging reconciliation and condonation subsequent to the filing of the first action. Lucy Bays answered the cross-complaint, and in June, 1934, the case was tried in respondent court, and an interlocutory decree was entered therein in August of that year in favor of defendant on his cross-complaint and denying plaintiff any relief. In the meantime, on July 26, 1934, on application of petitioner herein, as a brother of Lucy Bays, representing that she was an insane person by reason of the previous insanity proceedings of 1932, respondent judge made an ex parte order appointing petitioner as guardian ad litem of Lucy Bays in the first action, numbered 16482. After the entry of the interlocutory decree, petitioner, as such guardian ad litem, filed and made a motion to set aside the judgment in the second case, 17816, which motion was denied. Thereafter petitioner made application to respondent court to have the first case, 16482, set for trial, which application was likewise denied. Petitioner by this proceeding seeks a peremptory writ of mandate to compel respondent court to set case numbered 16482 for trial basing the right to thus bring it to trial on the provisions of section 594 of the Code of Civil Procedure.

By demurrer filed herein, respondents raise the question of sufficiency of the petition to warrant any relief in this proceeding. By their answer is presented the contention that respondent court was under no duty to set the case in question for trial, because it appears that issues were not joined or completed on the cross-complaint.

[1, 2] When there is a clear legal right to be enforced as well as a clear legal duty to be performed by the court, and when there is no other remedy, the writ of mandamus will lie. Conversely, if there is no duty on the part of the court to act in the premises, the writ is not issuable. Section 594 of the Code of Civil Procedure provides in general terms that "either party may bring an issue to trial or to a hearing." Rule I of the rules regulating the business of the superior courts, promulgated by the judicial council in 1929 under constitutional authority, provides that, for the purpose of setting a civil cause for trial, there shall be filed by a party to the case a memorandum which shall state that the cause is at issue, and containing certain other information, which memorandum shall have been previously served upon the attorneys for the parties; that "no cause shall be set for trial unless the memorandum herein mentioned shall have been served and filed," unless set upon stipulation of the parties. This rule is not inconsistent with the provisions of section 594 of the Code of Civil Procedure, but is supplementary thereto, and affords an orderly process to bring the issues in a case on for trial. See Mutual Building & Loan Ass'n v. Corum, 220 Cal. 282, 30 P.(2d) 509. The petition herein contains no averments showing compliance with this rule, which is necessary to the creation of a legal duty to set a cause for trial, from which it follows that the petition does not state facts which entitle petitioner to relief and the demurrer should be sustained.

[3, 4] In addition to the somewhat technical reasons given above why respondent court was under no present duty to set the first divorce case for trial, there is manifest from the record herein a substantial basis for a denial of the writ under the impulse of a wise discretion which we are called upon to exercise. The exercise of jurisdiction in mandamus proceedings is to a considerable extent in the sound discretion of the court. Wiedwald v. Dodson, 95 Cal. 450, 30 P. 580; American Securities Co. v. Forward (Cal. Sup.) 24 P.(2d) 810. We do not deem it wise or in promotion of justice to compel respondent court to set for trial and try the first case filed by Lucy Bays, in view of the fact that she, in effect, abandoned that case after an apparent reconciliation with her husband and filed a new one on which she went to trial on the complaint and cross-complaint therein, in which issues were joined, tried by the court, and fully determined and decided.

[5] It is of no material legal consequence that Lucy Bays was, in the interim between the filing of the two cases, committed to a state hospital under the Code provisions above cited. It has been clearly decided that the order of commitment was not a judicial determination that she was insane, so as to make her incompetent to make contracts within the meaning of section 40 of the Civil Code. Fetterley v. Randall, 92 Cal. App. 411,

268 P. 434; Matter of Guardianship of Carniglia (Cal. App.) 34 P.(2d) 752. It is not stretching the rule announced in the cited cases to hold that such commitment likewise did not render Lucy Bays incompetent to commence and carry on litigation in courts. It does not appear that during the progress of the trial of the second case any one claimed or even suggested therein that Lucy Bays was then insane. By filing and prosecuting the second suit, under the circumstances and the law as herein stated, Lucy Bays ought to be bound by the consequences thereof, in so far as her capacity or competency is concerned, subject, of course, to her right to move for relief therefrom by any or all the methods provided by law.

The alternative writ is dismissed, and a peremptory writ denied.

We concur: STEPHENS, P. J.; CRAIL, J.

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2 Cal.App.2d 447

PEOPLE v. De VAUGHN.

Cr. 1809.

District Court of Appeal, First District,
Division 1, California.
Nov. 27, 1934.

1. Homicide 🔑235

Evidence *held* to support conviction of second degree murder by abortion operation.

2. Criminal law 🔑1169(5)

Admission in evidence of defendant's business card, which was like card with words "Received $25" on its back in deceased's purse, *held* harmless to defendant in trial for murder by abortion, where jury was instructed to disregard such words and evidence, which was stricken from record.

3. Criminal law 🔑472

Physician's testimony in trial of another physician for murder by abortion that blood given deceased by transfusion was compatible with deceased's blood *held* not hearsay, but admissible as statement of positive fact within witness' knowledge.

4. Criminal law 🔑1171(6)

District attorney's argument, indicating that defendant in trial for murder by abortion was negro, *held* not prejudicial to him, especially as he was present at trial.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Oscar W. De Vaughn was convicted of second degree murder, and he appeals.

Affirmed.

Myron Harris, Wm. H. Older, and H. L. Richardson, all of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

PER CURIAM.

Appellant was charged with the crime of murder as the result of an alleged criminal operation performed upon the person of one Louise Swartz. He was convicted of murder in the second degree. From the final judgment of conviction and from an order denying his motion for a new trial, defendant appeals.

[1] Several grounds are urged for a reversal. It is first claimed that the evidence is insufficient to support the verdict. While the evidence is conflicting in some minor details, in our opinion it is amply sufficient. Such evidence in substance shows that deceased was the wife of one Manuel Swartz. There were two children issue of the marriage. In the month of January, 1933, deceased informed her husband she was pregnant and that she intended to have an abortion performed, as she did not desire to have any more children. At this time deceased was in a normal condition. Her husband told her it was a very dangerous thing to do, but that it was a matter she would have to decide for herself. About February 1 of the same year deceased requested her husband to take her to defendant's office. The husband, accompanied by her, the two children, and a lady friend, drove to the office of the defendant. The friend accompanied the deceased to defendant's office; the husband and children remaining in the automobile. There is evidence to show that deceased consulted defendant, informing him that she had a backache, a headache, and was also suffering from an offensive discharge. Defendant requested the friend to retire to the reception room; deceased remaining with defendant in his private office. An employee of defendant was ordered to have the deceased disrobe and prepared for an examination. There is no direct evidence as to what took place at this time; defendant not having taken the stand. As to the appearance of the deceased after she left defendant's office, there is a conflict in the evidence. There is evidence to show, however, that when she left the office she was

quite pale and was restless all night. It also appeared that her private parts were packed. Deceased again visited the office of defendant on three succeeding days, where she remained about an hour on each visit. Upon leaving the office on these occasions she was pale and very sick. After the last visit, the condition of the deceased grew alarming, and another physician was called in to attend her. He immediately ordered her to a hospital, and, concluding she was suffering from the effects of an abortion, he called in other physicians who confirmed his opinion. Deceased died on February 10. An autopsy revealed that her death was due to a blood clot which had formed as the result of an infection of the uterus due to an abortion. The clot had caused the left lung to completely collapse and solidify. The autopsy further revealed that the uterus was swollen and inflamed and that an abortion had been performed. There was also a pussy discharge from the vagina. The police authorities were notified. A search was made of defendant's office, and his files of patients did not include a card for deceased. After indictment, defendant was asked whether he was to set up the defense that he had never treated the deceased or that he had treated her for some ailment, and he answered he did not know. The evidence shows that a criminal agency was responsible for the death of deceased, and points unerringly to the defendant as the person performing the operation upon the deceased which caused her death. People v. Card, 40 Cal. App. 22, 180 P. 53.

[2] It is next urged that the trial court committed prejudicial error in admitting in evidence a business card of the defendant. It appeared that a like card was seen in the purse of deceased on the back of which appeared the words "Received $25.00." The evidence was harmless. The jury was instructed to disregard the words in question, and the evidence upon the subject was stricken from the record and the jury instructed to disregard it. It must be presumed that the jury followed the instructions of the court.

[3] It is next urged that the trial court erred in admitting certain alleged hearsay evidence of a physician in relation to blood transfusion which was given to the deceased. There is no merit in the contention. The doctor was asked concerning the character of the blood of the donor, and he testified that it was compatible with the blood of the recipient. This did not constitute hearsay, but rather the statement of a positive fact within the knowledge of the witness.

[4] Complaint is next made of alleged prejudicial misconduct of the district attorney in his argument to the jury, in using certain language which it is claimed indicated that defendant was a member of the negro race. We have been unable to find in the record any language that would so indicate, but how or in what manner this could prejudice the defendant we are at a loss to know. Moreover, defendant was present at the trial, and could be seen by the jurors.

No error has been shown, and the evidence being amply sufficient to support the verdict, the judgment and order must be, and they are hereby, affirmed.

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2 Cal.App.2d 536

MORRIS v. PURITY SAUSAGE CO. et al.

Civ. 8910.

District Court of Appeal, First District,
Division 1, California.

Dec. 3, 1934.

1. Negligence 🔑76

Generally, violation of statute or ordinance is negligence which will bar recovery if violation proximately contributes to injury.

2. Negligence 🔑76

Violation of statute or ordinance is excusable only when resulting from causes or things beyond control of person charged therewith.

3. Automobiles 🔑217(3)

Mere fact that pedestrian's passage across street is momentarily obstructed would not excuse his violation of ordinance requiring pedestrians to cross at crosswalks.

4. Automobiles 🔑246(31)

Instruction that if pedestrian was prevented from crossing at crosswalk because of presence of automobile other than defendant's mere fact that she left crosswalk to pass such obstruction would not of itself prevent recovery, and that it is not negligence as matter of fact to violate ordinance where all circumstances make compliance therewith impossible or unreasonable *held* properly refused as erroneous in part and misleading.

5. Trial ⚷260(8)

Refusal to instruct that amount of care required of automobile driver was greater than that required of pedestrian *held* not prejudicial, where question of driver's duty towards pedestrians was covered by other instructions.

6. Trial ⚷260(8)

In action by pedestrian struck by automobile, refused instruction that driver's failure to become aware of presence of another of whose presence he should have become aware is no excuse for conduct which would have amounted to recklessness if he had known of such person's presence *held* covered by given instruction that driver must exercise ordinary care to anticipate presence of others on highway and that neither driver nor pedestrian could assume that street was clear.

7. Trial ⚷260(8)

In action by pedestrian struck by automobile, refused instruction that it was for jury to determine whether motorist's speed, even if within maximum speed limit, was a careful and prudent speed *held* covered by given instruction that driver must proceed at careful and prudent speed not greater than is reasonable and proper having due regard for traffic, and surface and width of highway.

8. Automobiles ⚷246(60)

Where there was evidence adduced by plaintiff pedestrian and her only eyewitness that plaintiff violated ordinance by leaving pedestrian lane without being compelled to do so by prudence or necessity of avoiding danger, refusal of instruction that law presumes that person is not negligent and that such presumption should prevail if jury believed that plaintiff's injuries caused her lapses of memory and there was no evidence of negligence on her part *held* not error.

9. Automobiles ⚷246(31)

In action by pedestrian struck by automobile, instruction that pedestrian attempting to cross street at other than regular crossing place must exercise greater precautions than at established crossing, and that observance of due care under such circumstances is not fulfilled by merely looking to left and right as pedestrian steps on street, but that he must exercise such care all the time he is crossing, *held* correct.

10. Automobiles ⚷246(31)

In action by pedestrian struck by automobile, instruction that to bar recovery it must not only appear that ordinance was violated by pedestrian in not crossing on crossing lane but that its violation was "the" proximate cause of injury *held* properly refused as erroneous.

11. Trial ⚷267(2)

Where part of requested instruction was correct but part was erroneous, court was not bound to modify it and its refusal was not error.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Matilda Morris against the Purity Sausage Company, Conrad Annasohn, and another, individually and as copartners doing business under the name and style of the Purity Sausage Company, and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

See, also, 36 P.(2d) 126.

Ingemar E. Hoberg, of San Francisco, for appellant.

Cooley, Crowley & Supple, of San Francisco, for respondents.

PER CURIAM.

Plaintiff was struck and injured by an automobile operated by the defendants. The injury occurred while she was crossing New Montgomery street near its intersection with Mission street in San Francisco. According to her testimony, she was proceeding east following the pedestrian lane toward the southeast corner of the intersection. When she reached a point about a third of the way across, an automobile proceeding north was driven thereon and stopped, blocking her passage. She attempted to pass to the rear of this vehicle, and in so doing left the pedestrian lane and was injured by defendants' automobile, which was also proceeding north. She alleged that her injury was due to defendants' negligence. A jury returned a verdict in favor of the latter. A motion for a new trial was denied, and plaintiff has appealed from the judgment entered upon the verdict.

As grounds for her appeal, she contends that the court improperly refused certain instructions which she requested, and that an instruction given by the court was erroneous.

[1-4] The first offered instruction read as follows: "The mere fact that an ordinance of the city and county of San Francisco provided that plaintiff should cross New Montgomery street within the pedestrian cross-walk does not of itself bar her recovery in this action for her failure to comply therewith. If you believe from the evidence that the plaintiff, Matilda Morris, was prevented from crossing the pedestrian cross-walk because of the pres-

ence of an automobile thereon, then the mere fact that she left the pedestrian cross-walk to pass such obstruction would not of itself prevent her recovery in this action. It is not negligence as a matter of fact to violate such statute or ordinance where all of the circumstances at the time and place make compliance with such statute or ordinance impossible or unreasonable. Before such person can be barred from recovery it must be shown by the preponderance of the evidence that such person failed to exercise the care of an ordinarily prudent person acting under the same or similar circumstances."

The evidence was conflicting as to whether plaintiff was passing along the pedestrian lane when the first automobile blocked her way and then left it and attempted to go around the obstruction, and whether her course from the time she left the sidewalk was not entirely south of the pedestrian lane. The offered instruction assumes as a fact that she left the lane on account of the obstruction, and further states that it was not negligence as a matter of fact for her to violate a statute or ordinance if circumstances made compliance therewith impossible or unreasonable.

The violation of a statute or ordinance as a general rule constitutes negligence, which will bar a recovery if such violation proximately contributes to the injury. 19 Cal. Jur., Negligence, §§ 65, 67, pp. 632, 636. While it may happen that prudence and safety of life or limb require the doing of an act which would otherwise be a violation of law, and liability therefor may be avoided by showing that under the circumstances of the particular case the violation was justifiable or excusable, such violation is only excusable when it results from causes or things beyond the control of the person charged therewith. 45 Cor. Jur., § 121, p. 731; Mora v. Favilla, 186 Cal. 199, 199 P. 17. In the absence of an overruling necessity, the duty to comply with the law is not affected by the reasonableness of its requirement as applied to given circumstances, and the fact alone that a pedestrian's passage across the street is momentarily obstructed would not excuse its violation. The offered instruction was calculated to mislead the jury, and, being erroneous in part, was properly refused. Wiley v. Young, 178 Cal. 681, 683, 174 P. 316; Dover v. Archambeault, 57 Cal. App. 659, 208 P. 178.

[5] An instruction that both parties were charged with the same degree of care, but that the amount of care required of the driver of an automobile was greater than the amount required of a pedestrian was refused.

Such an instruction has been approved [Raymond v. Hill, 168 Cal. 473, 143 P. 743]; but here the question of the driver's duty towards pedestrians was fully covered by other instructions, and the refusal was not prejudicial.

[6] The first paragraph of the following instruction offered by plaintiff was given and the second paragraph refused:

"I instruct you that it is part of the duty of an operator of a motor vehicle to use ordinary care to keep his machine always under control so as to avoid collision with other persons lawfully using the highway and who are themselves in the exercise of ordinary care. He has no right to assume that the road is clear.

"Accordingly, if the operator of the vehicle should in the exercise of ordinary care have become aware of the presence of another in time to have avoided colliding with such other person, then the fact that he failed to become aware of the presence of the other is no excuse for conduct which would have amounted to recklessness if he had known of the presence of such person."

A similar instruction has also been approved. Meyers v. Bradford, 54 Cal. App. 157, 201 P. 471; Ramsey v. Pasini, 108 Cal. App. 527, 291 P. 884. However, the jury was elsewhere instructed that the driver of a motor vehicle must exercise ordinary care to anticipate the presence on the highway of other persons; and that neither the driver nor the pedestrian had the right to assume that the street was clear. While the whole instruction might properly have been given, the omitted portion was in substance covered by the other instructions.

[7] Two instructions stating in substance that, assuming that defendants' automobile was being driven within the maximum speed permitted by law, nevertheless the question whether it was being driven at a careful and prudent speed, having due regard to the traffic, surface, and width of the highway, was for the jury to determine, was refused.

The offered instruction contained a correct statement of the law [Truitner v. Knight, 83 Cal. App. 655, 257 P. 447], and it would have been proper to have explicitly charged that there might be negligence in the operation of a car even if the speed limit was not exceeded; but this was made sufficiently plain by an instruction that "any person driving a vehicle on a public highway of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper having due regard for the traffic, surface and width of the highway."

[8] Plaintiff testified that before starting to cross the street she looked to the right and left, but was unable to recall anything that happened after she left the pedestrian lane and passed to the rear of the obstructing car. A witness called by her testified that she left the lane and passed to the rear of the car mentioned and was then struck by defendants' car. This witness and the driver of defendants' car differed as to the distance south of the pedestrian lane where the collision occurred. It was raining at the time, and the driver testified that plaintiff who admittedly was not wearing a hat, had her coat over her head. This she denied. The foregoing, and the question of the speed of defendants' car, constituted the only conflicting testimony regarding the occurrence. Plaintiff offered an instruction that in the absence of evidence the law presumes that a person is not negligent; and that if the jury believed that her injuries caused her lapses of memory at the trial, and there was no evidence of negligence on her part, the presumption should prevail.

While an instruction that presumptively a person exercises due care for his own safety may be proper in cases where the plaintiff's evidence is not inconsistent therewith [Mar Shee v. Maryland Assurance Corporation, 190 Cal. 1, 210 P. 269; Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529], here there was adduced by plaintiff and her only witness to the accident evidence of her negligence, namely, that in violation of an ordinance she left the pedestrian lane, which was a place of safety, without being compelled to do so by prudence or the necessity of avoiding danger. Under the circumstances the refusal of the instruction was not error.

[9] The court instructed that a pedestrian who attempts to cross a street at other than a regular crossing place must exercise greater precautions than at an established crossing, and "that the observance of due care under such circumstances is not fulfilled by merely looking to the left and right as he steps upon the street; he must exercise that care during all the time that he was crossing." Plaintiff objects to this instruction on the ground that it requires a pedestrian while crossing to look in all directions at all times.

The instruction merely required due care in view of the increased hazard during all the time that the increased hazard continued, and correctly stated the rule in this regard. Sheldon v. James, 175 Cal. 474, 479, 166 P. 8, 2 A. L. R. 1493; Smith v. Southern Pacific Co., 201 Cal. 57, 66, 255 P. 500; Koeppel v. Daluiso, 118 Cal. App. 442, 5 P.(2d) 457. Salomon v. Meyer (Cal. Sup.) 32 P.(2d) 631, is not a decision to the contrary.

[10, 11] The court refused to instruct that the mere fact that plaintiff did not cross the street along a passenger lane would not alone show contributory negligence; that to establish such negligence it must not only appear that the ordinance was violated but that its violation was the proximate cause of the injury; and that notwithstanding such violation, if the jury found that the sole proximate cause of her injury was defendants' negligence, they should find for the plaintiff.

With one exception the proposed instruction was correct [Gett v. Pacific Gas & Electric Co., 192 Cal. 621, 221 P. 376], and this exception is the portion stating that to bar a recovery it must not only appear that the ordinance was violated but that its violation was the proximate cause of plaintiff's injury. This was not a correct statement of the law. 19 Cal. Jur., Negligence, § 153, p. 759; Squier v. Davis Standard Bread Co., 181 Cal. 533, 185 P. 391; Straten v. Spencer, 52 Cal. App. 98, 197 P. 540; Briggs v. Jess Mead, Inc., 93 Cal. App. 666, 270 P. 263; Flood v. Miura, 120 Cal. App. 467, 476, 8 P.(2d) 552. While it was held in the cases cited that the giving of such an instruction might not necessarily be prejudicial, nevertheless, being erroneous, it was not error to refuse it [24 Cal. Jur., Trial, § 77, p. 802; Hart v. Farris, 218 Cal. 69, 21 P.(2d) 432]; nor was the court bound to modify a proposed instruction [Garlick v. Bowers, 66 Cal. 122, 4 P. 1138; Johnson v. Southern Pacific Co., 105 Cal. App. 340, 288 P. 81]. Plaintiff admits that the jury was correctly instructed generally as to the effect of the violation of an ordinance, and told that such violation, to bar a recovery, must have been a proximate cause of her injury. This being true, it is not reasonable to believe that the jury was misled by the want of a specific instruction of the character she proposed.

The parties stipulated that the affidavit of one of the jurors was filed by plaintiff with the papers in the case in the office of the clerk of the trial court, and that a copy thereof be made a part of the record on appeal, the defendants, however, reserving all legal objections and exceptions to its admissibility, force, and effect. Subsequently by motion the plaintiff suggested a diminution of the record, it being alleged that the affidavit was considered by the trial court on her motion for a new trial. It appeared, however, that the affidavit was served and filed after the time allowed by section 659a of the Code of Civil Procedure for the service and filing of affidavits on a motion for a new trial, and that so far as shown no extension of time was granted. The motion was accordingly denied. This renders further consideration of the document unnecessary.

The facts of the present case closely resemble those in Hopkins v. Galland Mercantile Laundry Co., 218 Cal. 130, 21 P.(2d) 553, where it was held that the plaintiff was guilty of contributory negligence as matter of law and could not recover. At all events, the evidence fairly supports the verdict of the jury, and the record discloses no error which would justify the conclusion that a miscarriage of justice resulted therefrom.

The judgment is affirmed.

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2 Cal.App.2d 500

BARROW et al. v. SIMON et al.

Civ. 8066.

District Court of Appeal, Second District, Division 1, California.

Nov. 28, 1934.

Rehearing Denied Dec. 20, 1934.

Hearing Denied by Supreme Court Jan. 25, 1935.

1. Landlord and tenant 🔑291(13)

Finding that lessee had not been in actual or constructive possession of any portion of premises since date prior to commencement of lessors' action for unlawful detainer *held* unsupported by evidence which showed that colessee was in possession of part of premises and sublessee was in possession of another part.

2. Tenancy in common 🔑13

Colessee of real property is a tenant in common of leasehold interest, and possession of one cotenant is possession for all.

3. Landlord and tenant 🔑291(13)

Claim of eviction was not sustained in absence of evidence that lessee surrendered possession and where evidence showed that he remained in possession either in person, or by subtenant and cotenant.

4. Judgment 🔑715(3)

Judgment, based on finding that 20-day notice had not been given as required by lease and conclusions of law that action was prematurely brought and that judgment was not to prejudice rights of lessors to commence new action against any lessee upon its accrual, *held* not res judicata of liability of lessee in subsequent action for unlawful detainer commenced by lessors after giving 20-day notice.

5. Landlord and tenant 🔑291(6)

In action by lessors for unlawful detainer, failure to make receiver for sublessee a party defendant *held* no defense for lessee, since there was at most a nonjoinder of parties defendant, and trial court was bound to proceed as to defendants before it (Code Civ. Proc. § 1164).

6. Landlord and tenant 🔑291(7½)

In action by lessors against lessees and sublessee for unlawful detainer, court had jurisdiction to proceed against lessee upon whom only statutory three-day summons was served (Code Civ. Proc. § 1164).

7. Appeal and error 🔑1122(2)

Where judgment was reversed, cause must be remanded for further proceedings, and appellate court cannot make further findings of fact and render new judgment for appellants (Code Civ. Proc. § 956a).

◆

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Action by John V. Barrow and another against Rosalyn I. Simon, as executrix of the will of M. P. Simon, deceased, and others. From a judgment for defendants, plaintiffs appeal.

Reversed and remanded.

Charles E. Carter, Martin M. Levering, and Henry Trowbridge, all of Los Angeles, for appellants.

Black, Hammack & Black, of Los Angeles, for respondent Simon.

SCHAUER, Justice pro tem.

By this action for alleged unlawful detainer plaintiffs seek to recover possession of certain real property described in the pleadings, together with asserted unpaid accrued rental. The complaint alleges ownership of the property by the plaintiffs, the execution of a lease thereon with certain defendants, default in the payment of rent, the giving of the 20-day notice required by the lease, the statutory notice, and that "said defendants unlawfully hold over and continue in possession of said premises."

Judgment was rendered in favor of all defendants, and plaintiffs appeal therefrom, asserting insufficiency of the evidence to support certain findings of fact, as well as various alleged errors of law.

The trial court made no finding upon the issue raised by the allegation of nonpayment of accrued rent and the denial thereof, but predicates its judgment upon certain alleged affirmative defenses set forth in the answer of defendant M. P. Simon, upon which it made findings of fact in effect as follows:

(1) That the last-named defendant "has neither been in actual or constructive possession of any portion" of the demised premises since February 5, 1930, a date prior to the commencement of the present action;

(2) That the issues as to "liability for money claimed against the defendant M. P. Simon" were adjudicated in a prior action between the same parties; and

(3) That prior to the filing of the complaint a receiver was appointed for the defendant Richfield Oil Company, and that such receiver was not made a party defendant.

It appears that the lease was executed in the year 1923 by and between plaintiffs as lessors and defendants M. P. Simon, F. C. Williams, and W. W. Newsum as colessees; it was to run for a term of approximately 20 years and required monthly rental payments. In 1928 the lessees mentioned, together with the Richfield Oil Company of California, a corporation, executed a document denominated by them a "sub-lease" whereby such original lessees purported to "lease" to the oil company a portion of the premises described in the original lease for the full remainder of the term thereof.

[1, 2] 1. At the trial it was expressly admitted by all of the defendants, *including* Simon, that each defendant, *except* Simon, was then in possession of some part or parts of the demised property. There was also evidence that the defendant Newsum had transferred his interest under the lease to Simon, but that transfer is immaterial upon this appeal. In view of Simon's stipulation that at least one of his colessees was in possession of at least part of the premises, and the entire absence of evidence to establish any severance of Simon's interest from such colessees, the finding that Simon "has neither been in actual or constructive possession of any portion" of the premises since February 5, 1930, cannot be sustained. A colessee of real property is a tenant in common of the leasehold interest. The possession of one cotenant is possession for all. Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100; McClure v. Colyear, 80 Cal. 378, 22 P. 175; Wood v. Henley, 88 Cal. App. 441, 263 P. 870.

Neither do we think could such finding be sustained by reason of the possession of a portion of the property by the defendant oil company. The instrument evidencing the rights of such oil company in the property was denominated a "sub-lease," and although it purported to demise the portion of the property therein described to the oil company for the entire remainder of the lessees' term and might, under proper circumstances, be treated in law as a pro tanto assignment, it apparently was not recognized as such by the parties; the original lease contained a covenant against assignment and the plaintiffs decline to accept the oil company as an assignee, or in any capacity other than that of subtenant. Under the undisputed evidence, we think that the possession of the oil company was possession of the original lessees. Barhaus v. Producers Fruit Co., 192 Cal. 200, 205, 206, 219 P. 435.

[3] Respondent Simon's claim of eviction fails because there is no evidence to show that he ever surrendered possession, and there is the affirmative evidence that he remained in possession either in person, or by subtenant and cotenant.

[4] 2. The conclusion of the trial court that certain issues here were rendered res judicata by the proceedings in a prior action rests upon a judgment which in turn is founded upon a finding that a twenty-day notice, required by the lease, had not been given; and the following conclusions of law: "I. That the action brought by the plaintiffs herein was prematurely brought. * * * III. That the judgment to be entered herein shall not prejudice the rights of plaintiffs to commence a new action against the defendants, or either of them, upon the accrual of a cause of action against them, or either of them." It appearing that such twenty-day notice was given prior to the commencement of the present action, plaintiffs therefore are not precluded by such prior action from a determination upon the merits of the issues raised in the instant case.

[5] 3. The finding that a receiver had been appointed for the defendant Richfield Oil Company and not substituted herein is not available as a defense for the defendant Simon. The failure to substitute the receiver could constitute at most a nonjoinder of parties defendant, and by the provisions of section 1164, Code of Civil Procedure, the court was bound to proceed as to the defendants before it. Tujague v. Superior Court, 69 Cal. App. 35, 230 P. 198.

[6] 4. In the light of the foregoing conclusions, defendant Simon's contention that the court was without jurisdiction to proceed against him by reason of the fact that the only process served upon him was the

statutory three-day summons, is without merit.

[7] 5. Appellants urge this court, in the event of reversal, to take proceedings under section 956a, Code of Civil Procedure, make further findings of fact, and render a new judgment in their favor. It was not intended by such legislation to substantially change the functions of appellate tribunals to the extent of transposing to them the duty of hearing and determining contested issues of fact in the event of reversals of judgments of trial courts. In Tupman v. Haberkern, 208 Cal. 256, at page 266, 280 P. 970, 974, the Supreme Court discusses this enactment and concludes that its "primary and principal purpose" is to permit the appellate court to remedy defects "to the end that the judgment or order appealed from may be affirmed and further litigation terminated, and where otherwise under the old practice the judgment or order would have to be reversed." No machinery of law is set up by which appellate courts, if they were to act as trial courts, could enforce their original judgments. It follows that when a judgment is reversed the cause must be remanded for further proceedings.

The judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.

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2 Cal.App.2d 689

MORRIS PLAN CO. OF ORANGE COUNTY v. HEINZ.

Civ. 1556.

District Court of Appeal, Fourth District, California.

Dec. 7, 1934.

Appeal and error 🔑787

Where judgment was rendered December 28, 1933, notice of appeal was filed March 22, 1934, no proceedings for settlement of bill of exceptions or for preparation of reporter's transcript were pending in trial court, and time for instituting such proceedings had expired, respondent's unopposed motion for dismissal of appeal would be granted.

Appeal from Superior Court, Orange County.

Action by the Morris Plan Company of Orange County against Wm. J. M. Heinz, in which the defendant cross-complains. From the judgment, the plaintiff appeals. On motion to dismiss appeal.

Appeal dismissed.

Drumm, Tucker, Martell & Drumm, of Santa Ana, and Dana C. Smith, of Pasadena, for appellant.

Wm. J. M. Heinz and McFadden & Holden, all of Anaheim, for respondent.

JENNINGS, Justice.

This is a motion to dismiss an appeal. The certificate of the county clerk which has been filed in support of the motion shows that the judgment was rendered on December 28, 1933; that notice of appeal therefrom was filed by appellant on March 22, 1934; that no proceedings for the settlement of a bill of exceptions or for the preparation of a reporter's transcript to be used on the appeal are pending in the trial court and that the time for instituting such proceedings has expired. No showing in opposition to the motion has been made by appellant. Respondent's motion for dismissal of the appeal should therefore be granted. Steffey v. Standard Stations, Inc., 131 Cal. App. 202, 20 P.(2d) 971.

The appeal is dismissed.

We concur: BARNARD, P. J.; MARKS, J.

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2 Cal.App.2d 398

BRIDGE v. BOARD OF EDUCATION OF CITY OF LOS ANGELES et al.

Civ. 8408.

District Court of Appeal, Second District, Division 1, California.

Nov. 26, 1934.

1. **Schools and school districts** 🔑89

Knowledge of principal that cement sprinkler box had been on school grounds for several years in same condition as it was on day pupil was hurt *held* to establish element of constructive notice to school district, rendering it liable (Gen. Laws 1931, Act 5619, § 2; School Code, § 2.801).

2. **Appeal and error** 🔑1008(1)

Whether maintenance by school district of cement sprinkler box projecting above immediate surface of school ground was negligence causing injuries to pupil, and whether box was defective or dangerous, *held* questions of fact for trial court (Gen. Laws 1931, Act 5619, § 2; School Code § 2.801).

◆

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Frances Bridge, a minor, by Stella F. Bridge, her mother and guardian ad litem, against the Board of Education of the City of Los Angeles and another. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

Everett W. Mattoon, Co. Counsel, and Clarence B. Penn and W. B. McKesson, Deputy Co. Counsels, all of Los Angeles, for appellants.

Samuel A. Rosenthal and Golden & Kaufman, all of Los Angeles, for respondent.

HAHN, Justice pro tem.

Defendant appeals from a judgment rendered against it for $6,000 for injuries alleged to have been suffered by plaintiff, a ten year old child, who on the 26th day of April, 1930, was injured while playing on the school grounds of the Hoover Street school, where she attended as a pupil. The complaint alleges, as the proximate cause of her injuries, the negligence of the Los Angeles city board of education and its officers and agents in maintaining on the school grounds a concrete sprinkler box projecting above the immediate surface of the ground.

The main point urged by appellant for a reversal of the judgment is that plaintiff's cause of action may be maintained only under and by virtue of the provisions of an act of the Legislature adopted in 1923, known as Act No. 5619 (Deering's Gen. Laws 1931, Stats. 1923, p. 675), and that plaintiff has failed to prove the necessary elements specifically required by that act.

Section 2 of Act No. 5619, which is the only part of the act pertinent to the question here involved, reads as follows: "Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, building, grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

Respondent in reply contends that the action may be maintained under the provisions of section 2.801 of the School Code (St. 1929, p. 73), which, at the time of the accident, read as follows: "Boards of school trustees, high school boards, junior college boards and boards of education are liable as such in the name of the district for any judgment against the district on account of injury to any pupil arising because of the negligence of the district, or its officers or employees." The above-quoted section from the School Code is the re-enactment of a similar provision contained in section 1623 of the Political Code as amended in 1923 (St. 1923, p. 298). In support of her contention, respondent cites Ahern v. Livermore Union High School District, 208 Cal. 770, 284 P. 1105, 1111; Maede v. Oakland High School District, 212 Cal. 419, 298 P. 987, and Damgaard v. Oakland High School District, 212 Cal. 316, 298 P. 983, which, it is contended, are decisive of the question. Appellant argues that these and other cases, wherein judgments obtained against school districts for injuries suffered by pupils of the district through the negligence of its employees were sustained, should not be held to be determinative of the question here involved, for the reason that in those cases there was not involved the "dangerous or defective condition of school property," but rather the immediate negligence of a teacher in the conduct of his or her class-room work, which circumstance admittedly did not bring the cases within the provisions of Act No. 5619.

Appellant argues in persuasive fashion that, inasmuch as a right of action against a school district for the negligence of its officers or employees may be maintained only because of statutory enactment, one bringing such an action will be held strictly to the terms of the statute authorizing the liability. That, inasmuch as Act No. 5619 is the only statute that authorizes the maintaining of an action for injuries suffered on the school premises, plaintiff in her complaint and proof must bring herself within the scope of that act.

Premised upon this argument appellants contend that the cases cited by respondent are not in point, for in each of the above-cited cases the basis of the action was not the defective or dangerous condition of school property, but rather the dereliction of duty on the part of a teacher in the conduct of his direct or immediate relation to the pupil in the classroom. That the negligence upon which the right of action is based under the provisions of Act No. 5619 is not in the fact of the existence of the defective or dangerous condition of the property, but rather in the failure to remedy an existing defect, or remove a dangerous condition within a reasonable time after the school authorities have had notice that such conditions existed. In other words, the law gives no right of action against the school district simply because defective or dangerous conditions of the school premises were the cause of one's injuries. An essential element to such right of action is the notice to the proper school authorities and the subsequent failure to remedy the defect.

This contention was made in part at least in the Ahern, Damgaard, and Maede Cases, supra, cited by respondent, but failed to receive the approval of the court in either ot those cases. In the Ahern Case the court engaged in a most comprehensive discussion of the meaning, purpose, and application of Act No. 5619, and of section 1623 of the Political Code, as amended in 1923, and in conclusion makes the following comprehensive statement as to the meaning and scope of each of these statutes: "Act 5619 deals with the liability of counties, municipalities, and school districts to the general public for defective or dangerous conditions in the streets, grounds, or property of the counties, municipalities, or school districts, while that portion of the amendment to section 1623 of the Political Code enacted in 1923 with which we are now concerned, deals with the liability of the school district to school children for the negligence of 'the district or its officers or employees,' resulting in injury to said children. It is evident from the terms of these two legislative enactments that Act 5619 is a general act, defining the liability of the public bodies named therein to the general public and specifying the conditions under which said liability may attach, while the amendment of 1923 to section 1623 of the Political Code is a special act and purports to deal only with the liability of school districts to the children of the district for the negligence of the district or its officers or employees. In such a case the provisions of the special act must prevail over the terms of the general statute." The language of this declaration, in the light of the discussion which precedes it, would seem to leave little room upon which to ground the contention that it was not intended to declare the law applicable to the facts as they appear in the instant case.

In the Maede Case, supra, the plaintiff was injured by an explosion caused by a defective or improper gauge attached to an oxygen tank which had been furnished by the teacher to the pupils for use in connection with their classroom work. In that case the first count in the complaint was clearly drawn so as to bring the action within the provisions of Act No. 5619, alleging a defective condition of the gauge, knowledge of such defect on the part of the school authorities, and failure to correct the defect within a reasonable time, while counts 2 and 3 charged negligence against the school authorities in general terms. On appeal from the judgment in favor of plaintiff, the defendant urged that there was no evidence of knowledge on the part of the school authorities of the defective condition of the gauge, which was a necessary element under Act No. 5619, in order to sustain a judgment against the school district. The court, while expressing the opinion that there was sufficient evidence to support a finding of knowledge, declared the point to be of no importance, for under counts 2 and 3, which stated a good cause of action under section 1623 of the Political Code, as amended in 1923, no notice to the school authorities was required. In arriving at this conclusion the court specifically reaffirms its decision in the Ahern Case. No attempt is made by the court to distinguish the case from the Ahern Case, although the injury resulted from a gauge that was either defective or dangerous when attached to the tank. So it may be inferred that the court in the case of Dawson v. Tulare Union High School, 98 Cal. App. 138, 276 P. 424, in referring to the case of Huff v. Compton City Grammar School District, 92 Cal. App. 44, 267 P. 918, as a "similar case," considered that it was immaterial whether the injury resulted from defective condition of property belonging to the district, as that of the dolly on which the piano was placed in the Dawson Case, or the negligence of the janitor in leaving the burning rubbish in the incinerator unguarded as in the Huff Case.

[1] However persuasive may be appellants' argument on the point under discussion, it appears from the record that the complaint sufficiently pleads the elements necessary to bring the case under Act No. 5619. The court found for plaintiff on these material points,

and there is sufficient evidence to support the findings. The maintenance of the cement box on the school grounds is admitted. The principal of the school testified that she knew of the box being there for "several years" in the same condition as it was on the day plaintiff was hurt.

[2] Appellants concede that actual notice of the existence of the cement box was not necessary to put the school district on notice. The period of its known existence by the principal of the school was sufficient to establish constructive notice. Huff v. Compton City Grammar School District, 92 Cal. App. 44, 267 P. 918; Dawson v. Tulare Union High School, 98 Cal. App. 138, 276 P. 424. Appellants urge that the evidence does not justify the court's finding that the maintenance of the cement box in the manner shown constitutes negligence, or that it was either defective or dangerous. As these were questions of fact committed to the trial court for determination, we do not feel under the evidence that we are justified in disturbing the court's conclusions.

We do not discuss other points raised by appellants, as we are of the opinion they are without merit.

Judgment is affirmed.

I concur: YORK, J.

CONREY, Presiding Justice (concurring).

I concur in the judgment, solely on the ground that the facts pleaded, proved, and found, establish the existence of notice to defendants of the dangerous condition from which the accident originated, and because therefore the plaintiff had a cause of action coming within the conditions required by Act No. 5619. Notwithstanding the decision of the Supreme Court in Ahern v. Livermore Union High School District, 208 Cal. 770, 284 P. 1105, 1111, and unless that decision is the final word on the subject, I am of the opinion that, where the negligence relied upon relates to the dangerous or defective condition of public property, there can be no cause of action without the notice or knowledge required under the terms provided in Act No. 5619. It seems to me that the dissenting opinion by Mr. Justice Preston (concurred in by Justices Richards and Shenk) correctly stated the law when he said that "a substantive right of action in such case is controlled by Act 5619 of the General Law." But let it be conceded that a right of action for injuries caused to a pupil by reason of negligence in maintaining a defective or otherwise dangerous condition of school property, as well as injuries resulting from other descriptions of negligence, was authorized by section 1623 of the Political Code and is now authorized by section 2.801 of the School Code. Yet I see no reason why the Legislature might not concurrently provide, as it did, that, where the injury arises out of a dangerous or defective condition of public property (any public property), the right of action shall be limited to cases where there was knowledge or notice such as the Act No. 5619 requires. To hold otherwise results in giving a preference to one class of litigants. Thereby other litigants, seeking the same relief and for the identical description of injury, are deprived of "the equal protection of the laws."

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2 Cal.App.2d 464

PEOPLE v. PACE.

Cr. 2523.

District Court of Appeal, Second District, Division 1, California.

Nov. 28, 1934.

1. **Criminal law** 🔑1202(1)

Determination that defendant was habitual criminal *held* error, where based on prior conviction for larceny in Pennsylvania for which defendant served term in penitentiary, where such larceny would have constituted petty theft in California (Pen. Code, §§ 488, 490, 644, 666, 668; 18 PS Pa. § 2771).

2. **Criminal law** 🔑304(11)

Court takes judicial knowledge of laws of several states and interpretation thereof by highest courts of appellate jurisdiction of such states (Code Civ. Proc. § 1875, subd. 3).

3. **Larceny** 🔑1

Simple "larceny" under common law is felonious taking and carrying away of personal goods of another.

[Ed. Note.—For other definitions of "Larceny," see Words & Phrases.]

4. **Larceny** 🔑1

Acts in California constituting larceny are now included within crime of "theft," though change of name from larceny to theft was one of form and not of substance (Pen. Code, § 484).

[Ed. Note.—For other definitions of "Theft," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Frank Pace was convicted of violating the State Narcotic and Drug Act and of being an habitual criminal, and he appeals.

Reversed, with directions.

Frederic H. Vercoe, Public Defender, and William B. Neeley, Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

ELLIOT CRAIG, Justice pro tem.

Defendant was charged in count I of an amended information with violation of State Narcotic and Drug Act (St. 1929, p. 380, as amended), a felony, and with having theretofore suffered three prior convictions of felony and terms of imprisonment therefor in penal institutions. Defendant pleaded guilty to violation of State Narcotic and Drug Act, denied the first and second alleged prior convictions, and admitted the third prior conviction and imprisonment therefor. The charge of the first prior conviction was stricken out, and on trial the court found the charge of the second prior conviction to be true, and that defendant served a term of imprisonment therefor in a penal institution. Defendant was adjudged to be an habitual criminal under the provision of section 644, Penal Code, for having suffered two prior convictions of the felonies named in said section and having served terms of imprisonment therefor in penal institutions, and sentenced to imprisonment in Folsom state prison.

Defendant's appeal is from the judgment but on appeal he complains only that the evidence is not sufficient to sustain the court's decision as to said second prior conviction, the adjudication of being an habitual criminal and the sentence based thereon.

[1] The prior conviction complained of was for larceny committed in the state of Pennsylvania in 1923 and for which defendant served a term in the Western State Penitentiary of the said state. It was stipulated at the trial that the property taken in said larceny was $10. The defendant claimed on trial, and now claims, that the conviction for such larceny cannot be treated as a felony conviction under sections 644 and 668 of the Penal Code.

[2] This court takes judicial knowledge of "the laws of the several states of the United States and the interpretation thereof by the highest courts of appellate jurisdiction of such states." Code Civ. Proc. § 1875, subd. 3.

The state of Pennsylvania looks to the common law for its criminal law, except where the common law has been expressly modified by statute.

The statutes of Pennsylvania prescribe: "If any person shall be guilty of larceny, he shall, on conviction, be deemed guilty of felony, and be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years." Section 2771, title 18, of Purdon's Pennsylvania Statutes Annotated (Permanent Edition).

[3, 4] There is neither statutory definition of larceny nor statutory division of larceny as to degree or as to being petty (petit) or grand larceny in Pennsylvania. Simple larceny under common law "is the felonious taking and carrying away of the personal goods of another." Cooley's Blackstone (3d Ed.) p. 229, book IV.

Larceny, although no longer expressly defined by California laws, has a well-known meaning. The change of name from larceny to theft was "one of form and not of substance." People v. Myers, 206 Cal. 480, 485, 275 P. 219, 221.

Acts in California constituting a larceny are now included within the crime of theft. Section 484, Pen. Code.

We have examined an exemplified copy of the indictment found and returned in Pennsylvania and introduced by defendant as an exhibit in the trial court. It affirmatively appears therefrom that the larceny therein charged, and upon which the charge of the said second alleged prior conviction of felony is based, was a simple larceny in the sum of $10.

"Every person who has been convicted in any other state, government, or country, of an offense which, if committed within this state, would be punishable by the laws of this state by imprisonment in the state prison, is punishable for any subsequent crime committed within this state in the manner prescribed in sections 644, 666, * * * and to the same extent as if such prior conviction had taken place in a court of this state." Section 668, Pen. Code.

If above-mentioned larceny had been committed in this state, it would have constituted petty theft, a misdemeanor, and would not have been "punishable by the laws of this state by imprisonment in the state prison." Sections 488 and 490, Pen. Code.

"Every person who, having been convicted of petit larceny or petit theft and having served a term therefor in any penal institution, commits any crime after such conviction, is punishable therefor as follows:

"1. If the offense of which such person is subsequently convicted is such that, upon a first conviction, an offender could be punished by imprisonment in the state prison for any term exceeding five years, such person may be punished by imprisonment in the state prison for the maximum period for which he might have been sentenced if such offense had been his first offense, but in no case less than five years." Section 666, Pen. Code.

Violation of State Narcotic and Drug Act can be punished by a maximum term of more than five years in the state prison.

From the foregoing, we conclude that the trial court was in error in its decision that the second alleged prior conviction of felony was true, in adjudging defendant to be an habitual criminal under section 644, Penal Code, and in sentencing defendant as such habitual criminal.

The judgment appealed from is reversed, with directions that defendant be brought before the trial court for a new sentence on his conviction of violation of State Narcotic and Drug Act, after having suffered one prior conviction of felony (to wit, escape from state prison, being the above-mentioned third prior conviction charged in the amended information), and having served a term therefor in a penal institution, and after having suffered a prior conviction of petit larceny and having served a term therefor in a penal institution.

We concur: CONREY, P. J.; YORK, J.

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2 Cal.App.2d 544

WAGNER v. McMANUS.

Civ. 9531.

District Court of Appeal, First District, Division 2, California.

Dec. 3, 1934.

1. Appeal and error 🔑882(3)

Where case was tried on theory that issue of fraud and misrepresentation was properly before court, and admission of evidence thereon was not objected to, that fraud and misrepresentation were not sufficiently pleaded as defense would not be considered.

2. Landlord and tenant 🔑231(8)

In action to collect unpaid rent, evidence supported finding that agreement under which rent was due was obtained through fraud and misrepresentation.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action on a contract by George W. Wagner against G. W. McManus. From the judgment, the plaintiff appeals.

Affirmed.

Rodgers & Costello, of Palo Alto, for appellant.

Byrl R. Salsman, of Palo Alto, for respondent.

NOURSE, Presiding Justice.

Plaintiff sought to collect unpaid rent, basing his claim on an alleged written agreement to lease signed by the defendant. Judgment went for defendant on the grounds that the agreement was obtained through misrepresentation and fraud.

Defendant was given notice to vacate premises occupied by him as a fruit and vegetable market, and in August, 1933, he discussed the leasing of plaintiff's premises with the latter's real estate broker. During these negotiations defendant paid a $25 deposit for which he obtained no receipt. On Saturday morning, September 2, 1933, the broker came to defendant's store and asked him to sign a paper which defendant claims he stated was merely a receipt for the $25. Defendant protested as he was busy waiting on customers during the usual Saturday morning rush, but the broker followed him around the store until the defendant finally signed the paper which he claims he did not read. The broker testified that there was no misunderstanding at the time. This paper was in the form of a receipt for the $25 deposit paid, but it contained language which the plaintiff read to make a written lease of the premises. This paper is the basis of the action. On September 5 the broker presented a formal lease which the defendant refused to sign, and on September 9 the defendant informed the broker that, since his landlord had withdrawn his notice to vacate, he did not want plaintiff's premises. Notice in writing was sent to defendant that he would be bound by the terms of the paper dated September 2. At no time, until the premises were otherwise occupied, was the "for rent" sign removed from plaintiff's property.

The first question raised by appellant is: Was the written agreement sufficient to bind the parties? He cites several cases to show that a person may be held by a written contract before the lease is signed. But respondent shows that these cases refer to written documents made in mutual agreement which he claims was not the case in this instance.

Appellant's second question is: Does an unilateral mistake made through failure to read a paper relieve a party from his written agreement? Respondent answers that when a mistake is the result of misrepresentation, fraud is involved. He then refers to the evidence that the broker not only misrepresented the document as a mere receipt, but used undue pressure to get defendant to sign at a time when he was unable to read the paper. The trial court found that, in view of the broker's knowledge and intent, respondent's reliance upon his representations, and the manner in which the signature was procured, fraud was involved which destroyed the essential element of the contractual relation—the intention to make a contract.

[1] Appellant's third question is: Has fraud and misrepresentation been sufficiently pleaded as a defense? He argues that neither actual nor constructive fraud has been pleaded because the pleadings do not allege either knowledge or intent on the part of the broker. The evidence of fraud and misrepresentation was not objected to by appellant. The cause was tried on the theory that the issue was properly before the court and objection to the form of the pleading cannot be made at this time. Etienne v. Kendall, 202 Cal. 251, 259 P. 752; Langstaff v. Mitchell, 119 Cal. App. 407, 6 P.(2d) 546.

[2] Finally, appellant raises the question: Does the evidence sufficiently prove fraud and misrepresentation? In order to prove fraud, he argues, the burden of proof is on the pleader and this proof must be clear and decisive. The testimony of the broker is to the effect that he did not mislead defendant; the testimony offered by respondent is to the contrary. This testimony is direct and clear evidence of the fraud charged. With this conflicting evidence the trial court found for the respondent and, since there is nothing inherently improbable in this evidence, we are bound by that finding.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

1 Cal.App.2d 481

Nellie G. METCALF, Plaintiff and Respondent, v. METROPOLITAN LIFE INSURANCE COMPANY, a Corporation, Defendant and Appellant.

Civ. 5137.

Supreme Court of California.
Dec. 18, 1934.

In Bank.

Appeal by defendant from a judgment of the Superior Court of Napa County, Percy S. King, Judge, in an action on a policy of life insurance.

Petition denied.

For prior opinion, see 37 P.(2d) 115.

Knight, Boland & Riordan and F. Eldred Boland, all of San Francisco, for appellant.

Clarence N. Riggins, of Napa, for respondent.

PER CURIAM.

The petition is denied. In denying said petition, we withhold our approval of that portion of said opinion relating to section 450 of the Civil Code.

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2 Cal.2d 29

KERN COUNTY LAND CO. v. RAILROAD COMMISSION et al.*

KERN ISLAND CANAL CO. v. SAME.

S. F. 15130, 15131.

Supreme Court of California.
Nov. 28, 1934.

Rehearing Denied Dec. 28, 1934.

1. Waters and water courses 🔑**256**

Spirit and purpose of statutory proviso that water corporation need not secure certificate of public convenience and necessity from Railroad Commission for extension of its system into contiguous territory may be violated to such extent as to violate requirement that territories be contiguous, though lands to which system is extended are physically contiguous (St. 1915, p. 148, § 50 (a).

2. Waters and water courses 🔑**256**

Whether territory, into which water corporation's system was extended without Railroad Commission's certificate of public convenience and necessity, is contiguous to such system within meaning of statute, is primarily fact question within commission's exclusive jurisdiction as fact-finding body, and its findings will not be disturbed by court, if supported by any substantial evidence (St. 1915, p. 148, § 50 (a).

3. Waters and water courses 🔑**256**

Railroad Commission's finding that lands, comprising narrow strip seven miles long, connected with area added to area originally served by water company by small triangle of land about quarter mile wide at point of contact with land in extended area, and adjoining lands subsequently acquired by company, were not contiguous to company's system, as required by statute to authorize extension thereof to such lands without Railroad Commission's certificate of public convenience and necessity, *held* warranted (St. 1915, p. 148, § 50 (a).

4. Waters and water courses 🔑**256**

Evidence of existence of public utility canal service in certain territory when canal company extended ditch into such territory *held* to warrant Railroad Commission's finding that area had been served by other public utilities before extension, though water served by them was that of canal company (St. 1915, p. 148, § 50 (a).

5. Waters and water courses 🔑**256**

Where no protest against or resistance to extension of canal company's system into noncontiguous territory was made by other canal companies and land company, and facts of extension and relationship among such companies were first inquired into on Railroad Commission's motion after one of canal companies had served territory for over ten years, no policy leading to restrictions on extension of facilities into such territory can be considered or applied (St. 1915, p. 148, § 50 (a).

6. Public service commissions 🔑**19(1)**

Railroad Commission has general power to make injunctive orders in exercise of its jurisdiction, but must weigh all considerations, including equities in favor of party sought to be restrained and all those affected by order.

7. Waters and water courses 🔑**256**

Railroad Commission *held* not required to enter absolute cease and desist order in water users' proceeding to curtail service of water by canal company to lands not contiguous to its system, but bound to permit company to continue such service, if possible, without prejudice to users in original area, after having done so without objection by other utility companies for long period (St. 1915, p. 148, § 50 (a).

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*Rehearing denied 39 P.(2d) 402.

8. Waters and water courses ⚷256

New or additional consumers of water in noncontiguous territory, to which canal company's system was extended without Railroad Commission's certificate of public convenience and necessity, *held* not entitled to continuation of service in times of shortage to prejudice of consumers in original area (St. 1913, p. 85, §§ 5, 6; St. 1915, p. 148, § 50 (a).

9. Waters and water courses ⚷256

Railroad Commission's order that lands not requiring nor served water by canal company for many years be excluded from company's service area, "except as may be subsequently authorized by the commission," *held* sufficient to protect interests of company, as well as landowners.

◆

In Bank.

Proceedings by the Kern County Land Company and the Kern Island Canal Company, respectively, to review an order of the Railroad Commission.

Order annulled in part, and matter remanded to the Commission.

McCutchen, Olney, Mannon & Greene, of San Francisco, for petitioners.

Ira H. Rowell, Roderick B. Cassidy, Frank B. Austin, and Arthur T. George, all of San Francisco, for respondents.

Athearn, Chandler & Farmer, of San Francisco (Arthur M. Free, of San Jose, and Edward G. Chandler and Milton T. Farmer, both of San Francisco, of counsel), amici curiæ.

PER CURIAM.

Each of the above-named petitioners seeks by review the annulment of an order of the Railroad Commission.

In one proceeding before the commission, consumers of Kern Island Canal Company, a public utility, sought to curtail the service of water by the utility to lands in the Kern river delta region to which its system had been extended. In another proceeding the commission on its own motion brought before it other public utility canal companies also serving in that region. The proceedings were consolidated before the commission, and, after public hearings had, the commission entered its order. The pertinent portions of the order before us for review and the facts bearing thereupon are the following:

The predecessor of Kern Island Canal Company was organized to serve that portion of the territory known as the Kern river delta region situate below the city of Bakersfield in Kern county. The portion served extended from the Kern river on the north, south through range 28 east, and the easterly portion of range 27 east, M. D. B. & M., to Kern Lake, which formerly received the overflow of this region, but which has been reclaimed and is now dry lake bed. The lake area commences in the northerly tier of sections in township 32 south, range 27 east, and extends through that township over an area of about 17,000 acres. The area originally served by the utility was extended to include the dry bed of the lake, and the Petersdorf ditch, a branch of one of the company's main canals, was constructed along the southerly boundary thereof to serve this additional area. The southwestern extremity or boundary of the area as thus extended was the westerly line of township 32 south, range 27 east, or what is called in the record the San Emidio road. The service to this area through the Petersdorf and other ditches was commenced about the year 1893. In 1914 the construction of a new branch of one of the main canals was begun. This additional ditch, called New Rim ditch, circled the dry lake bed area along its southerly boundary, paralleling for the most part the Petersdorf ditch. In 1917 the New Rim ditch reached the westerly line of the lake bed, or San Emidio road. In the proceedings before the commission, no question was raised of the right of the canal company to serve these 17,000 acres in the lake bed, which is contiguous to the area originally served, and which service at the time of the hearing had continued for a period of thirty years through either the Petersdorf ditch or the New Rim ditch. The New Rim ditch, in fact, was constructed and is owned by Kern County Land Company. Until the year 1918 this ditch served but a small portion of land which was not susceptible to irrigation through the Petersdorf ditch.

It is appropriate here to note the fact that the land company directly or indirectly also owns all or a major portion of the stock of the Kern Island Canal Company and of other public utility canal companies in the Kern river delta region, about eight in number, and is the owner of about seven private canal systems which serve land of the Kern County Land Company. Further, the land company owns a portion of the irrigated lands within the areas served by all of those public utilities, with perhaps one exception, including ownership of about 44 per cent. of the irrigated lands served by Kern Island Canal Company. It may also here be noted that no particular issue is raised by reason of the fact that the New Rim ditch was constructed and owned by the land company. All parties appeared to concede that the extension of the facilities, no matter by whom constructed, was an extension of the "line, plant, or system" of the canal company within the meaning of section 50(a) of the Public Utilities Act (Stats. 1915, pp. 115, 148). Valley Natural Gas Company v. Midway Gas Company, 13 Opinions & Orders of Railroad Comm., 313.

In 1917 or 1918 the construction of the New Rim ditch was continued in a northwesterly and westerly direction as far as the Buena Vista levee for the purpose of serving lands acquired by the land company in section 18 of township 32 south, range 27 east, and sections 12, 11, 10, 9, 8, and 7 of township 32 south, range 26 east. These additional lands comprised a narrow strip seven miles in length, connected with the dry lake bed area by a small triangle of land comprising about half of section 18, township 32 south, range 27 east, which, at its westerly point of contact with the strip in township 32 south, range 26 east, is one-quarter mile or less in width. Subsequently the land company acquired the Cornwall lands which adjoin the last-mentioned string of sections on the north, and comprise sections 6, 5, 4, 3, and 2 of township 32 south, range 26 east, and these combined sections are in the record designated as the Panhandle area.

The lands in the Panhandle area prior to 1930 were devoted mainly to alfalfa and grain crops which require their main irrigation in the season when the supply of water is adequate to serve the old area as well as all the territory in the Panhandle area to which the system has been extended. No complaint was made by any one of this extension of the canal company's system until 1930 and subsequently, when a large portion of the Panhandle area was devoted to the culture of cotton, which requires irrigation as well in July and August when the normal flow in Kern river is low.

The issue respecting the extension into this section upon which the commission made its findings was whether the canal company had the right, pursuant to section 50 (a) of the Public Utilities Act, to extend its system into the Panhandle area without first having obtained a certificate of public convenience and necessity, and whether, no such certificate having been obtained, the canal company should be restrained from serving water in that territory. That section provides: "No * * * water corporation shall henceforth begin the construction of * * * a line, plant or system, or of any extension of such * * * line, plant, or system, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction; provided, that this section shall not be construed to require * * * such corporation to secure such certificate for an extension * * * into territory * * * contiguous to its * * * line, plant, or system, and not theretofore served by a public utility of like character. * * *" The commission found that the Panhandle area under the facts and within the meaning of the act was not contiguous to the "line, plant or system" of the canal company, and that theretofore the lands had been served by public utilities of like character. The commission on this finding based its order that the canal company cease and desist from furnishing and delivering water to the Panhandle area unless and until a certificate of public convenience and necessity authorizing an extension to that area first be obtained. Both the canal company and the land company seek by these proceedings to review the order of the commission in this regard. An exercise of power by the commission in excess of its jurisdiction is claimed.

[1-4] The commission holds the view that no other provision of law nor any policy based on the principles of laches or estoppel can have the effect to legalize an extension into territory in violation of section 50 of the Public Utilities Act. While not questioning the soundness of this view, we are nevertheless persuaded that under the facts presented by the record the finding upon which the commission based its order is not conclusive as to the character of the order which it could or should have made or of the issues upon which a different order might properly have been based. We deem it unnecessary to discuss at great length the contentions and arguments with respect to the commission's conclusion that the Panhandle area is not contiguous to the territory served by the canal company, or to its system, or its conclusion that the area had theretofore been served by similar public utilities. The decisions indicate that the question whether two areas are contiguous is not always to be determined by the physical fact of contiguity; that is, in a proper case, where, although the lands are physically contiguous, nevertheless the spirit, purpose, and objects to be attained by the regulation in respect thereof may be violated to such an extent as to constitute the extension a violation

of the requirement that the territory must be contiguous. People v. Young, 301 Ill. 67, 133 N. E. 693; Board of Education v. Board of Education, 121 Ohio St. 213, 167 N. E. 872. In such cases the question whether the territory is contiguous is primarily a question of fact within the exclusive jurisdiction of the fact-finding body. Its findings will not be disturbed if there is any substantial evidence to support them. Western Canal Co. v. Railroad Commission, 216 Cal. 639, page 646, 15 P.(2d) 853, and cases cited. We perceive no reason in the present case to disturb the finding of the commission that the lands are not contiguous. This applies as well to the finding that the Panhandle area had been served by other similar public utilities prior to the extension into it of the New Rim ditch. There was evidence that public utility canal service had existed in this territory prior to and at the time of the extension thereto of the New Rim ditch, through the Buena Vista, Stine, and Farmers canals. The canal company contends that the evidence is that the water served by these other utilities to the lands in the area, with the exception of the Cornwall lands which were served from a private source, was Kern Island Canal Company water. This fact, if it is a fact, would not show any lack of support for the commission's finding. It is the fact of the existence of the prior utilities' ability to serve the area that is controlling. When their systems and equipment are already in the field, they are entitled to consideration before a competitor may be allowed to enter.

[5] The facts in the present record, however, have brought about an obviously unusual situation. Because of the family union among the various utility canal companies and the land company, no protest or resistance has been made to the extension of the canal company's system into the Panhandle area. It was therefore on the commission's own motion, after these lands had been served by the canal company for a period of more than ten years, that the facts of the extension and the relationship among the utilities and between them and the land company were inquired into. It becomes apparent, therefore, that the persons who became entitled to primary consideration in the proceedings before the commission were those upon whose complaint the matter was first called to the commission's attention. They are the users of the water served by the Kern Island Canal Company in the old area. Other utilities have never objected to the entrance of the canal company into the new field. Any policy favoring economy leading to restrictions on the extension of facilities into territory already served by an adequate system it is now too late to consider or apply.

[6, 7] There is no policy in the law, however, which requires the commission to enter an absolute cease and desist order in a situation such as all those interested in the present case find themselves. It is true that the commission has general power to make injunctive orders in the exercise of the jurisdiction conferred upon it (Motor Transit Co. v. Railroad Comm., 189 Cal. 573, 577, 209 P. 586); but this relief is equitable in its nature, and all considerations must be weighed by the commission, including as well the equities in favor of the party sought to be restrained and all those who will be affected by the order. In the light of the facts in the record which show that for a long period the land company has been receiving and the canal company has been serving, in the Panhandle area, without the objection of any person for whose protection the statutory provisions were enacted, the waters from its Kern Island Canal system which have not been needed or required by consumers in the old area, it became incumbent upon the commission to frame its order so as to permit the canal company to continue to use any such waters if it could be done without prejudice to the users in the old area. For this purpose it should have made findings in relation to the quantum of such waters, if any, as would be found to be or become available for use by the canal company or the land company in the Panhandle area.

[8] We perceive, however, no facts or equities in this case which call for the application of the exception provided by section 6 of the Water Companies Act (Stats. 1913, pp. 84, 85) or of the decision in Butte County W. U. Ass'n v. Railroad Commission, 185 Cal. 218, 196 P. 265, relied upon by the petitioner Kern County Land Company in support of its contention that, having once been served with water by the utility, it is entitled to a continuation of the service in times of shortage. In the case relied upon, it was held that later consumers, having once been served with water through the system, were entitled to a continuation thereof in times of shortage on a pro rata basis, with no preference or priority in favor of the old consumers, and the order to that effect was affirmed. However, in that case the affirmative showing was that the inclusion within the system of the new consumers was in all respects in accordance with statutory law. The correct application of that decision to the antecedent facts and the equities in the present case merely constitutes the land

company a new or additional consumer, within the meaning of section 5 of the Water Companies Act, and justifies and requires the exercise of the power of the commission pursuant to that section to determine what amount of water may be served to the new or additional consumer or consumers in the Panhandle area which will not injuriously withdraw the supply wholly or in part from the consumers in the old area. Our conclusion in respect to this phase of the case is not to be deemed to entitle the Kern Island Canal Company in the future to serve any water to said territory, with the exception of such waters as the commission shall find are not required for use in the old area, without first having procured the certificate required by section 50 (a) of the Public Utilities Act.

[9] The commission also made an order that certain lands designated as "A" lands, which had not required nor been served water for fifteen years, should be excluded from the service area of the Kern Island Canal Company, "except as may be subsequently authorized by the commission." The commission, in explanation of the form of its order, states that it so left the matter in order to afford an opportunity for a modification of the order should any error have been made, and thus prevent any injustice to any person. The owners of these lands are not protesting the order. The only protestant is the petitioner Kern Island Canal Company. Its interests, as well as those of the owners of such lands, are sufficiently protected by the form of the order.

That portion of the commission's order directing that Kern Island Canal Company cease and desist from furnishing or delivering water to the Panhandle area unless and until a certificate of public convenience and necessity authorizing an extension to this area shall first be obtained should be annulled, and the matter be remanded for further proceedings to the end that a finding be made as to what amount of water, if any, may be furnished to lands in the Panhandle area without prejudice to the rights of users in the old area, and until the further order of the commission; and that an order be made in conformity with the views herein expressed.

It is so ordered.

On Petitions for Modification and for Rehearing.

PER CURIAM.

In view of the petitions for modification of the order appended to the foregoing opinion, it is appropriate to state that it was not intended that the commission might not make a general finding as to what water, if any, is available to the consumers in the Panhandle area which is not required by the consumers in the old area and the use of which would not prejudice the rights of the consumers in that area. Furthermore, it was intended that the commission should retain a continuing jurisdiction over the matter, and in connection therewith it would undoubtedly have the power to formulate and enforce such rules and regulations governing water service as might be necessary for the protection of consumers of the canal company and to permit the sale and delivery of water by it to consumers in the Panhandle area when the same may be done without prejudice to the rights of consumers in the old area for present and prospective domestic and irrigation uses.

The petitions for modification and for rehearing are denied.

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2 Cal.2d 39

MEYER v. RILEY, Controller.

S. F. 15204.

Supreme Court of California.
Nov. 28, 1934.

1. States 🔑64

Statute authorizing payment of salaries of state officers out of general fund *held* sufficient authority for payment of salary of chief of division of service and supply in department of finance out of general fund, if not otherwise prohibited (Pol. Code, § 656).

2. Constitutional law 🔑62
States 🔑44

Statute creating office of chief of division of service and supply, in so far as providing for fixing of his salary by director of finance with approval of Governor, *held* not invalid as unlawful delegation of legislative power (Pol. Code, § 656).

3. States 🔑64

There may exist impossibility of payment of salary of state officer from any budget allowance, and still be authority otherwise in law for payment thereof.

4. States 🔑64

Salary of chief of division of service and supply, as fixed by director of finance with approval of Governor, *held* payable from general fund in state treasury, notwithstanding constitutional provision governing appropriations, and notwithstanding prohibitory provision in 1933 appropriation for department of finance (Pol. Code §§ 656, 1029; St. 1933, p. 819; Const. art. 4, § 22).

LANGDON, J., dissenting.

In Bank.

Mandamus proceeding by Fred W. Meyer against Ray L. Riley, as Controller of the State of California.

Peremptory writ of mandamus issued in accordance with opinion.

E. R. Hoerchner, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for respondent.

SHENK, Justice.

This proceeding in mandamus is submitted on a general demurrer to the petition.

From July 1, 1933, to April 30, 1934, the petitioner was chief of the division of service and supply in the department of finance, an office created by the Legislature in 1931 by an amendment to section 656 of the Political Code (St. 1931, p. 843). Pursuant to the provisions of that section he was appointed by the Governor and his salary was fixed by the director of finance with the approval of the Governor at $475 per month. Under section 663 of the Political Code the chief of the division of service and supply is ex officio a member of the state board of control. After his appointment the petitioner performed the duties of his office. He filed his demands for payment of his salary, and upon the refusal of the respondent controller to audit and approve the same, this proceeding was commenced for the purpose of compelling such approval.

[1] The petitioner, during the period mentioned, was a de jure officer performing important state functions as chief of his division and as a member of the board of control. He has performed the service required of him and is entitled to compensation for such service if there is legal authority for its payment. For such authority he points out that prior to his appointment and service his salary was fixed in accordance with section 656 of the Political Code and that no provision was made in the budget of 1933 for the payment thereof. He therefore concludes that his salary is payable from the general fund under section 1029 of the Political Code, which provides: "Unless otherwise provided by law, the salaries of officers must be paid out of the general fund in the state treasury. * * *" This provision is sufficient authority for the payment of said salary out of the general fund, if other provisions of the law do not prevent it.

[2] The respondent resists the payment on two main grounds: First, it is insisted that the fixing of the salary of a public officer is a legislative act, and that section 656 of the Political Code, in so far as it provides for the fixing of the salary of the chief of the division of service and supply by the director of finance with the approval of the Governor, is invalid as an unlawful delegation of legislative power. That the point is not well taken is indicated, with supporting authorities, in Millholen v. Riley, 211 Cal. 29, at page 35, 293 P. 69.

[3, 4] Second, the respondent invokes section 22 of article 4 of the Constitution, which provides that "no money shall be drawn from the treasury but in consequence of appropriation made by law," and calls attention to the fact that no specific appropriation was made in the budget enactment of 1933 for the payment of the salary of the petitioner, and to the further fact that item 38 of the 1933 budget bill is as follows: "For support of Department of Finance, nine hundred nine thousand eight hundred six and 35/100 dollars; provided that no money hereby appropriated shall be used for salary and expenses of Chief of the Division of Service and Supply. * * *" (St. 1933, p. 819.) Accordingly, it is insisted that there was not only no appropriation made by the Legislature in 1933 for the payment of said salary, but that the Legislature specially directed that no such salary be paid. Conceding the absence of any appropriation in the budget enactment of 1933 for the payment of said salary, and having in mind the prohibition of item 38 of that bill, it does not necessarily follow that there is no authority in law for the payment thereof. In other words, there may exist an impossibility of payment of the salary of a state officer from any *budget* allowance, and still be authority otherwise in law for the payment thereof. Humbert v. Dunn, 84 Cal. 57, 24 P. 111.

It is difficult to understand the legislative process by which the Legislature continued in effect the enactments creating the office of chief of division of service and supply, and fixing his salary, and making him a member ex officio of the state board of control with the attendant important duties to be performed by such officer, and at the same time provide that no money appropriated *by the budget bill* in 1933 be used for the payment of such salary, unless it be either that the Legislature intended that the continuing provisions of said section 1029 should be sufficient to authorize such payment, or that other measures were pending or contemplated during the legislative session of 1933 looking to a reorganization of the department of finance with the elimination of the office of the chief of the division of service and supply, and the substitution of some other officer as a member of the state board of control. If the former were intended, the purpose was evidenced by the continuing legislation left undisturbed, which would, as indicated, be sufficient warrant for the payment of such salary. If the latter were the legislative plan, it fell short of its purpose, for we have discovered no legislation in 1933 to reorganize the department of finance or to abolish the office of petitioner. We therefore find an important state office in existence under a valid statute, an officer of the state occupying the same under a valid appointment, with his salary fixed in accordance with law, all prior to the enactment of the 1933 budget bill. We also find that the duties of such officer have been performed by the petitioner during the period involved, and we conclude that he is entitled to the payment of his salary under section 1029 of the Political Code, notwithstanding the inhibition of the budget enactment of 1933.

In a similar situation this court said in Humbert v. Dunn, 84 Cal. 57, 24 P. 111: "The limitation that 'no money shall be drawn from the treasury but in consequence of appropriations made by law' is taken literally from the constitution of the United States. Its object is to secure to the legislative department of the government the exclusive power of deciding how, when, and for what purposes the public funds shall be applied in carrying on the government. 2 Ops. Atty. Gen., 670. It had its origin in parliament in the seventeenth century, when the people of Great Britain, to provide against the abuse by the king and his officers of the discretionary money power with which they were vested, demanded that the public funds should not be drawn from the treasury except in accordance with express appropriations therefor made by parliament (Hall. Hist. 555); and the system worked so well in correcting the abuses complained of, that our forefathers adopted it, and the restraint imposed by it has become a part of the fundamental law of nearly every state in the Union. To the legislative department of the government is intrusted the power to say to what purpose the public funds shall be devoted in each fiscal year, and, as stated before, when the legislature has clearly indicated its will as to the claim which is to be paid and the fund from which it is to be paid, the constitutional requirement is satisfied, and no particular form of words is essential to make the appropriation valid." See, also, Jackson v. Baehr, 138 Cal. 266, 71 P. 167; Harrison v. Horton, 5 Cal. App. 415, 90 P. 716; 46 Cor. Jur., pp. 1014, 1028.

The respondent further insists that item 38 of the 1933 budget enactment is authority "otherwise provided by law" as contemplated by section 1029 of the Political Code and that the effect thereof is to prohibit the payment. We do not so construe section 1029. That section plainly and rightfully assumes that the salary of a state officer shall be paid from some source, and unquestionably means that if payment thereof be not otherwise provided for, it shall be made from the general fund.

The respondent concedes that if the salary of the petitioner had been fixed in a definite amount in section 656 of the Political Code, such provision, together with said section 1029, would constitute a valid appropriation. But he contends that since under section 656 this salary was subject to increase at the option of the director of finance and the Governor, the amount thereof would lack "the first essential to an efficient appropriation" under the rule laid down in Ingram v. Colgan, 106 Cal. 113, 38 P. 315, 39 P. 437, 28 L. R. A. 187, 46 Am. St. Rep. 221. That is the coyote scalp bounty case wherein it appeared that although the Legislature had provided for the payment by the state from the general fund of bounties for coyote scalps at $5 per scalp, no limitation as to the amount to be expended for that purpose had been specified, no valid appropriation had therefore been made, and the utmost that could be said for the act was that it pledged the good faith of the state to the making of an appropriation upon sufficient proof of the destruction of coyotes as provided in the act. While it is true that the Legislature did not set a limit upon the amount of salary to be paid to the petitioner, it did provide a method by which that amount could be and it was made certain by the joint action of the director of finance and the Governor, to whose discretion the Legislature had committed the authority to fix the amount. As indicated, the delegation of power was valid, and the exercise of the power has not been shown to have been invalid.

Let the peremptory writ issue as prayed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.

LANGDON, Justice (dissenting).

I dissent. There is no legal foundation for petitioner's claim, and the opinion inaugurates a practice which is dangerous in the extreme. As pointed out in said opinion, the established principle, expressly stated in our Constitution, requires a legislative appropriation as a basis for the payment of money from the public treasury. The obvious method of appropriating money for a particular purpose is the specific designation of a certain sum for that purpose. There was no such designation here. There might also be an appropriation, under the decisions, if section 656 of the Political Code had fixed a salary for petitioner. In such case, construing this section with section 1029 of the same Code, the salary fixed by law would be payable out of the general fund. See Harrison v. Horton, 5 Cal. App. 415, 90 P. 716; Humbert v. Dunn, 84 Cal. 57, 24 P. 111.

But the instant case falls entirely outside the rule of these decisions. Assuming that section 656, in providing that petitioner's salary shall be fixed by the director of finance with the approval of the Governor, is a valid statute establishing his position, it still is not a legislative appropriation. It does not designate an amount, and therefore "lacks the first essential to an efficient appropriation." Ingram v. Colgan, 106 Cal. 113, 38 P. 315, 39 P. 437, 28 L. R. A. 187, 46 Am. St. Rep. 221. Moreover, section 1029 states that the payment of salaries shall be made out of the general fund "unless otherwise provided by law." The Budget Act (St. 1933, p. 819, item 38) certainly provides otherwise when it states that "no money hereby appropriated shall be used for salary and expenses of Chief of the Division of Service and Supply."

It is unsound to start with the premise that petitioner has performed the duties of an important state office under a valid statute and to conclude therefrom that he is entitled to compensation. The constitutional requirement of a valid appropriation is entirely clear and is well known. Petitioner, in taking the office and performing services, was presumably aware of the fact that no valid provision for compensation existed, and that in unmistakable terms the Legislature had left his compensation out of the appropriation bill. We cannot destroy one of the most fundamental of our constitutional safeguards out of a sympathetic desire to pay petitioner for services which he rendered knowing the risk of nonpayment.

2 Cal.2d 23

CONLEY v. HAWLEY et al.

L. A. 13642.

Supreme Court of California.

Nov. 28, 1934.

1. Municipal corporations 🔑519(6)

As between two street improvement liens, lien of one subsequently imposed was superior and execution of deed in pursuance of sale to satisfy such lien extinguished prior lien and all rights in property acquired by prior lienor under deed from city treasurer (St. 1885, p. 147).

2. Taxation 🔑745

Law in force at time property was assessed for general taxes and when property was sold to state for delinquent taxes *held* to govern effect of tax collector's deed to state (Pol. Code, § 3787).

3. Taxation 🔑732

Statute providing that tax deed to state conveyed absolute title, free of all incumbrances, *held* to refer to existing incumbrances and not to prevent creation of future incumbrances which might come into being thereafter or while property was in possession of state (Pol. Code, § 3787).

4. Taxation 🔑726

Property acquired by state through delinquent tax sales is held by state in its proprietary capacity and not for governmental purposes.

5. Taxation 🔑183

Property held by state in its proprietary capacity is subject to general assessments and other burdens not imposed on property impressed with public purpose.

6. Municipal corporations 🔑426

Property acquired by state through tax sale and held by state in its proprietary capacity was subject to assessments for street improvement and to sale by city on failure to pay assessments (St. 1885, p. 147; Pol. Code, § 3787).

7. Taxation 🔑832

Purchaser under tax deed *held* not entitled to reimbursement for money expended by him as taxes, penalties, and cost on subsequent sale for failure to pay street improvement lien, since tax statute applied only when sale for general taxes had been declared void (St. 1885, p. 147; Pol. Code, §§ 3787, 3898).

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Oliver Cram Conley against Gertrude Hawley, T. A. Davis, and others. From a judgment, T. A. Davis appeals.

Affirmed.

Prior opinion, 25 P.(2d) 855.

Winslow P. Hyatt, of Los Angeles, for appellant.

Arthur E. Briggs, of Los Angeles, for respondent.

CURTIS, Justice.

This action was instituted to quiet title of plaintiff to a certain lot of land situated in the city of Inglewood. The plaintiff prevailed and the defendant has appealed from the judgment in plaintiff's favor.

[1] Plaintiff claims under a city treasurer's deed executed in pursuance of street improvement proceedings instituted under the improvement act of March 18, 1885. (St. of 1885, p. 147, and acts amendatory thereof and supplemental thereto.) This act is better known as the Vrooman Act. Defendant claims under a city treasurer's deed, executed in pursuance of like proceedings instituted under the same act. The proceedings under which the defendant's deed was executed were instituted and consummated long prior to the institution of the proceedings under which plaintiff's deed was executed. The lien, therefore, of the plaintiff being subsequent in time to that of defendant is superior to that of defendant, and a sale to satisfy plaintiff's lien and execution of a deed by the city treasurer in pursuance of said sale completely extinguished the lien of the defendant and all of his rights in said real property acquired by him under his treasurer's deed. Woodill & Hulse Elec. Co. v. Young, 180 Cal. 667, 182 P. 422, 5 A. L. R. 1296; Balaam v. Pacific States S. & L. Co., 219 Cal. 612, 28 P.(2d) 1053; Neary v. Peterson (Cal. Sup.) 37 P.(2d) 82.

[2, 3] The defendant also claims title to said real property under a sale thereof to the state for delinquent taxes for the year 1911. The property was sold to the state for delinquent taxes in 1912, and by the state to defendant Davis in 1917. At the time said property was assessed for general taxes as well as when the property was sold to the state for delinquent taxes by deed from the tax collector to the state, section 3787 of the Political Code provided that "such deed conveys to the state the absolute title to the property described therein, free of all encumbrances." There are certain exceptions to this general statement but none of them has any bearing on the question now before us. The law then in force governs the effect of the deed issued in pursuance thereof. Teralta Land, etc., Co. v. Shaffer, 116 Cal. 518, 48 P. 613, 58 Am. St. Rep. 194; Johnson v. Taylor, 150 Cal. 201, 88 P. 903, 10 L. R. A. (N. S.) 818, 119 Am. St. Rep. 181. The state therefore by said tax deed acquired said property free of all incumbrances which would include liens of all kinds The incumbrances mentioned in said section 3787 of the Political Code, however, referred to existing incumbrances and not to future liens or incumbrances against said property which might come into being thereafter or during the time the ownership of the property was in the state. The lien of the plaintiff resulting in his deed from the city treasurer arose after the state received its deed to said property and while said property was in state ownership. Whether any such future liens or incumbrances might lawfully or legally be created against said property while in state ownership would depend upon the question as to whether said state owned property was subject to or liable for future taxes or special assessments levied against it.

[4, 5] Property acquired by the state through delinquent tax sales is held by the state in its proprietary capacity and not for governmental purposes. Lands so held are subject to general assessments and other burdens not imposed upon property impressed with a public purpose. In the recent case of La Mesa, etc., Irr. Dist. v. Hornbeck, 216 Cal. 730, 738, 17 P.(2d) 143, 147, it was expressly stated that, "Moreover, the law recognizes a distinction between property impressed with a public purpose and property of an agency not so impressed, for in the latter instance the property may be sold for delinquent special assessments levied by other agencies or may be affected by adverse possession and other burdens of private property."

[6] No claim is made that the property here involved, during the time it was held by the

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

state, was put to any governmental use. It was, therefore, held by the state in its proprietary capacity. In the case of City Street Improvement Co. v. Regents, etc., 153 Cal. 776, 778, 96 P. 801, 18 L. R. A. (N. S.) 451, this court cites with approval the following statement of the law from Hamilton on Special Assessments, § 318, "Exemptions made by general laws in favor of such property [publicly owned] apply only to the general purposes of government, state, county, and municipal, even where the statute exempts the specific property from taxation of every kind, or from being taxed by any law of the state, and do not apply to the system of special assessment for local improvements." The court, on page 779 of 153 Cal., 96 P. 801, 802, in that case gives the reason why such property should not be exempt from special assessments for local improvement as follows: "A different rule would compel individual lot owners to pay assessments levied for improvements which were of benefit to the state lands without any adequate advantage, and in many instances impose a burden which would be extremely onerous and produce great injustice. This could not have been intended." In the case of City Street Improvement Co. v. Regents, etc., supra, the court held that lands held by the regents of the state University not in actual use for school purposes were subject to assessments for street improvements, and that such an assessment might be enforced against said land, the same as against the property of a private person. In that case the court, after citing authorities from various courts, sums up the situation as follows (page 781 of 153 Cal., 96 P. 801, 802): "A reading of these cases will disclose that in many of the states, upon the theory that, in the absence of express prohibition, even the state should bear its share of benefits for special assessments, it is held that property, although devoted to public use, is liable to such assessment. The rule in this state is, as above indicated, that such property when actually devoted to the public use is exempt; otherwise not." In California Jurisprudence the rule is stated as follows: "While local assessments are laid under the taxing power, they are not taxes in the ordinary understanding of that term, or within the meaning of the word as used in the provisions exempting lands of the state from taxation. Public policy, of course, forbids the application of general law to property held in trust for public purposes, such as public buildings, and necessary land upon which they stand. But the rule goes no further, and whenever lands, though owned by some public agency or mandatory of the government, are not in use in the performance of a public function, such lands, in the absence of constitutional or legislative restrictions, may justly be compelled to bear their part of expense which goes directly to increase their values. So lands of a municipality, situated within an irrigation district are not expressly exempt from assessment by such district, but there may exist an implied exemption, dependent upon the use to which the property is put. Likewise, lands of a school district which are held as an investment may be assessed for improvements the same as those of any private owner."

Defendant relies upon the recent cases of La Mesa Irr. Dist. v. Hornbeck, 216 Cal. 730, 17 P.(2d) 143, and Neary v. Peterson (Cal. App.) 30 P.(2d) 55. We fail to see how the defendant can derive any comfort from the decision in either of those cases. The first involved the construction of section 3787 of the Political Code, as amended in 1927 (St. 1927, p. 1666), and the priority of the respective liens therein mentioned. It was held that liens for general taxes were on a parity with liens for certain special assessments enumerated in said section of the Code. In the case of Neary v. Peterson, this court ordered a hearing after its decision by the District Court of Appeal. On hearing before us, while we arrived at the same conclusion as that reached by the District Court of Appeal, we rewrote the case and held that, "The liens are therefore on a parity, made so by statute, and the lien for the subsequent street improvement remained intact, notwithstanding the sale to respondent." The judgment of the trial court was reversed. Neary v. Peterson (Cal. Sup.) 37 P.(2d) 82, 84. As the respondent in that action claimed under a sale to the state for general taxes, the facts in that case are in principle precisely like those in the instant action. That case, therefore, not only fails to support defendant's contention, but is practically a conclusive authority in plaintiff's favor. It is true that under the statute these liens were all placed on a parity, while under the statute in force at the time of the sale for general taxes to the state of the property herein involved, the statute provided that the deed to the state "conveys to the state the absolute title to the property described therein, free of all encumbrances," but, as we have previously held herein, the incumbrances therein referred to were existing incumbrances and not such liens or incumbrances as might thereafter be legally created upon the property by the statutory or other law of the state.

[7] Defendant also contends that the treasurer's deed under which the plaintiff claims title is illegal and void by reason of certain irregularities in the street improvement proceedings before the city council pursuant to which said bond was issued. We have carefully considered these alleged irregularities and find no substantial merit in defendant's contention that they are of such serious import as to invalidate said bond or to affect plaintiff's title to said real property. It is not necessary to enter into any discussion of defendant's argument in support of this contention. For the benefit of counsel, we would say that we are in thorough accord with the conclusion of the District Court upon the questions therein involved and a repetition here of the reasons for such conclusion would serve no useful purpose. Neither do we think that defendant is entitled to reimbursement under section 3898 of the Political Code for moneys expended by him as taxes, penalties, and costs. This section only applies when the sale for general taxes has been declared void for any purpose. The sale by the state was valid, and the purchaser thereby acquired the legal title to the property conveyed. The fact that this title was lost by foreclosure of a paramount lien does not bring the case within the terms of said section.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; THOMPSON, J.; LANGDON, J.; SEAWELL, J.

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2 Cal.App.2d 578

Ex parte BALL.

Cr. 2640.

District Court of Appeal, Second District, Division 2, California.

Dec. 4, 1934.

1. Process ⇨64

Where process server, who had previously served petitioner, approached petitioner with process in hand similar to that previously served, and stated while 12 feet away that he had another one of "those things" for petitioner, and threw process at petitioner when petitioner began to walk away, and stated that petitioner was served, personal service was made on petitioner.

2. Public service commissions ⇨12

Railroad commission is its own judge as to service of its process, and District Court of Appeal will not interfere with its determination unless facts fail to show any substantial evidence of service.

3. Process ⇨64

When men are within easy speaking distance of each other, and facts occur that would convince reasonable man that personal service of legal document is being attempted, service cannot be avoided by denying service and moving away without consenting to take document in hand.

◆

Petition of E. R. Ball for a writ of habeas corpus.

Writ discharged, and petitioner remanded.

Leland S. Bower, of Los Angeles, for petitioner.

Roderick B. Cassidy, of San Francisco, and Rex Boston, of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

Petitioner was legally confined to the county jail unless personal service of process from the railroad commission had not been made.

[1] The facts are as follows: Petitioner, an active business man, had been in litigation before the commission theretofore and had had legal papers from the commission served upon him which were of similar appearance to the process in this proceeding. The process server, who had previously served petitioner, approached the petitioner at the same place he had formerly served him, and when within about twelve feet of him, and with the process in his hand, said: "I have here another one of those things for you." Petitioner replied: "You have nothing for me," and started to walk away. While petitioner was moving away in a sidewise manner and looking at the server, the server handed or tossed the process toward petitioner, it falling a few feet from him, at the same time saying, "Now you are served." Petitioner did not pick it up, but continued to walk away from the premises.

[2] The commission assumed the jurisdiction sought to be obtained by personal service of the process, and we think rightfully so. In the first place the commission is its own judge as to the service of its process, and we cannot interfere with this power unless the

facts should fail to show any substantial evidence of service.

[3] We take it that, when men are within easy speaking distance of each other and facts occur that would convince a reasonable man that personal service of a legal document is being attempted, service cannot be avoided by denying service and moving away without consenting to take the document in hand.

The writ is discharged, and petitioner is remanded.

We concur: CRAIL, J.; SCOTT, Justice pro tem.

2 Cal.App.2d 442

HARDY v. ROSENTHAL.

Civ. 1481.

District Court of Appeal, Fourth District, California.

Nov. 26, 1934.

Hearing Denied by Supreme Court Jan. 24, 1935.

1. Judgment ⇨585(1)

Judgment to be res judicata requires identity of question litigated in the two cases which would form basis of recovery in second case.

2. Judgment ⇨704

Judgment against motorist, truck driver, and his employer for damages sustained by house owners when motorist collided with truck, causing truck to run into house, *held* not res judicata as to negligence of employer in action by him against motorist, since questions in prior case were not identical and parties had not been adverse (Code Civ. Proc. § 1910).

◆

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by H. J. Hardy against Thomas Rosenthal. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hearing denied by Supreme Court; THOMPSON, J., dissenting.

Joe Crider, Jr., of Los Angeles, and Forgy, Reinhaus & Forgy, of Santa Ana, for appellant.

Robert B. Burch, of San Diego, and West & West, of Santa Ana, for respondent.

MARKS, Justice.

Plaintiff recovered judgment against defendant for damages resulting from a collision between a loaded gasoline truck and trailer, driven by Jessie W. Nicholson, an employee of plaintiff, and an automobile driven by defendant. The sole question to be decided here is whether a prior judgment in favor of the plaintiffs in an action brought by Emil Stoffel and Carnation Stoffel against Jessie W. Nicholson, H. J. Hardy and T. Rosenthal, is a bar to a recovery by the plaintiff in the instant case.

This case comes before us on the judgment roll, with the pleadings, verdict, and judgment in the Stoffel case, which are exhibits in the instant case, included in the clerk's transcript. Whether these exhibits are properly before us might be questioned, but, because they are fully summarized in the findings of fact, this question is rendered unimportant.

The facts pertinent to this appeal may be stated as follows: At 8 o'clock in the morning, on December 11, 1932, Emil Adolph Stoffel and his family were in their home near San Juan Capistrano in Orange county. The house was situated on the west side of the main highway between Los Angeles and San Diego (United States Highway No. 101). Mr. Stoffel, his wife and family, including a two weeks old baby, were inside the house when an automobile driven by defendant in attempting to pass a tank truck and trailer loaded with gasoline (owned by Hardy and driven by Nicholson) collided with the truck and trailer. As a result of the collision, the automobile and the truck and trailer ran off the highway and into the house of Stoffel, striking it with such force that it was thrown from its foundation. It immediately caught fire and was burned. Stoffel received personal injuries, his two weeks old baby was killed, Hardy's truck and trailer were demolished and burned, and Rosenthal's car seriously damaged. Stoffel and his wife filed suit against Hardy, Nicholson, and Rosenthal, charging that their damages were caused through the joint negligence of Hardy, acting through his employee Nicholson, and of Rosenthal. They recovered judgment against the three defendants. Counsel are in agreement that this judgment was paid by Hardy and Rosenthal.

[1, 2] Defendant maintains that, as the jury in the Stoffel case necessarily found that Hardy, acting through his employee, and

Rosenthal were both guilty of negligence which caused the injuries to the Stoffels, the trial judge was precluded from finding Hardy, acting through his employee, free from contributory negligence in the instant case. He cites the following cases in support of this contention: Southern California Railway Co. v. Workman, 146 Cal. 80, 79 P. 586, 82 P. 79, 2 Ann. Cas. 583; Fox v. Workman, 155 Cal. 201, 100 P. 246; Bingham v. Kearney, 136 Cal. 175, 68 P. 597; Horton v. Goodenough, 184 Cal. 451, 194 P. 34; In re Estate of Clark, 190 Cal. 354, 212 P. 622, 625; Martin v. Holm, 197 Cal. 733, 242 P. 718; Todhunter v. Smith, 219 Cal. 690, 28 P.(2d) 916, and Olney v. Cavell, 138 Cal. App. 233, 32 P.(2d) 181, 182.

In re Estate of Clark, supra, we find the following: A "judgment is binding, not only in proceedings upon the same, but also upon a different cause of action in so far as it settles and determines questions of fact. 23 Cyc. 1288–1290. It is well settled that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them, not only when the subject-matter is the same, but when the point comes incidentally in question in relation to a different matter in the same or any other court. Freeman on Judgments, §§ 249 and 253; Lamb v. Wahlenmaier, 144 Cal. 91, 77 P. 765, 103 Am. St. Rep. 66; Reed v. Cross, 116 Cal. 473, 484, 48 P. 491; Atchison, T. & S. F. Ry. v. Nelson, 220 F. 53, 135 C. C. A. 621. That is to say, 'a matter of fact once adjudicated by a court of competent jurisdiction, concurrent or exclusive, may be relied upon as an estoppel in any subsequent collateral suit in the same or any other court, at law, in chancery, in probate or in admiralty, when either party, or the privies of either party, allege anything inconsistent with it, and this too whether the subsequent suit is upon the same or a different cause of action. The facts decided in the first suit cannot be disputed.' Bigelow on Estoppel, pp. 110, 111, 112; Rauer v. Rynd, 27 Cal. App. 556, 150 P. 780."

In Olney v. Cavell, supra, the court said: "This case seems to come squarely within the meaning of section 1911 of the Code of Civil Procedure. The same question between the same parties being necessarily involved in the present case, the former adjudication was conclusive 'not only as to matters actually decided in the former controversy, but as to all matters belonging to the subject of the controversy * * * which also might have been raised and decided.' Minnis v. Equitable Life Assur. Soc., 204 Cal. 180, 183, 267 P. 538, 539; In re Estate of Bell, 153 Cal. 331, 95 P. 372; Elm v. Sacramento Suburban Fruit Lands Co., 217 Cal. 223, 17 P.(2d) 1003. 'It is not what was actually done, but what might have been done, that is concluded by a former judgment.' Henderson v. Miglietta, 206 Cal. 125, 127, 273 P. 581, 582." These rules are generally but not always subject to the condition that the parties to the second action must have been adversaries in the first litigation.

It is apparent that, to constitute a judgment in one case a bar to the prosecution of a second action, there must have been an identity of a question litigated in the two cases which would form the basis of a recovery in the second case. Such identity is entirely lacking in the two cases we are considering. In the instant case the material questions, other than the measure of damages, are: (1) Was Rosenthal guilty of negligence that proximately caused the damage to Hardy? (2) Was the truck driver guilty of contributory negligence? The collision between the two vehicles occurred in the public highway, and the questions of negligence and contributory negligence might well have been determined by the actions of the two drivers up to the moment their vehicles came together. The Stoffels were in their home, which was off from and to the west of the highway. After the collision, the truck and automobile veered off the highway and crashed into the Stoffel house. In that case the jury might have concluded that, after the collision of the vehicles in the highway and before the truck struck the house, the truck driver did something which a reasonably prudent person would not have done, or failed to do something which a reasonably prudent person would have done, and by such negligence permitted the truck to crash into the house. What the truck driver did, or failed to do, after the collision of the vehicles in the road, might have constituted negligence that would support a recovery in the Stoffel case and in no manner have contributed to the actual collision.

A further reason for concluding that the judgment in the Stoffel case could not estop the plaintiff from recovering in the instant case is found in the following quotation from Victor Oil Co. v. Drum, 184 Cal. 226, at page 239, 193 P. 243, 248, where it was said: "The defendants also contend that the court erred in refusing them leave to file a supplemental answer pleading a judgment against the plaintiff and Drum in an action by the Hamilton Company, wherein a number of the questions of fact involved here were, according to defendants' contention, determined adversely to the plaintiff. The only object of the supplemental answer was to set up the judgment by way of estoppel. The refusal of the court to permit this was correct, since the judgment would not have so operated. It would not so operate because it was not between the parties to this litigation. It is true that both Drum and the plaintiff were parties defendant in the action in which the judgment was rendered, but the judgment was not between them, but between them on the one side and the plaintiff in that action on the other. A judgment may operate as an estoppel between parties to it only when they are adverse parties, so that the judgment is a determination of issues between them. Section 1910, Code Civ. Proc.; 23 Cyc. 1237."

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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2 Cal.App.2d 658

COVERRUBIAS et al. v. BROWN.

Civ. 1484.

District Court of Appeal, Fourth District, California.

Dec. 6, 1934.

Hearing Denied by Supreme Court Feb. 4, 1935.

1. Automobiles 🔑226(2)

Defendant motorist's action in entering intersection when he saw another automobile approaching and in "going pretty fast" while so doing, if negligence, *held* not proximate cause of collision with automobile traveling at high speed on wrong side of highway under evidence.

2. Automobiles 🔑201(1)

Negligence of driver of automobile in which injured persons rode, resulting in his being on wrong side of road without adequate cause at time of collision at intersection, *held* proximate cause of collision under evidence.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by Esperanza Coverrubias and others against A. P. M. Brown. From an adverse judgment, defendant appeals.

Reversed.

Forgy, Reinhaus & Forgy, of Santa Ana, for appellant.

Burke & Colwell and West & West, all of Santa Ana, for respondents.

BARNARD, Presiding Justice.

A Chevrolet automobile owned by Juan Gonzales and driven by his brother Basilio Gonzales collided with an Oldsmobile automobile driven by the appellant, Brown, on April 23, 1932, at the intersection of Placentia avenue and Center street near the city of Anaheim. George Coverrubias, a passenger in the Chevrolet, was killed in the collision, and Jesus Coverrubias, another passenger, was injured. This action for damages was brought by the mother of the deceased, by the owner of the car, and by the injured passenger, who was a minor. After a trial without a jury, the court found that the defendant was guilty of negligence which was a proximate cause of the accident, that the driver of the other car was also guilty of negligence, and that the deceased and the minor plaintiff were not guilty of contributory negligence. This appeal is from a judgment entered in favor of the mother, and the minor plaintiff.

[1] The only question requiring consideration is whether findings to the effect that the appellant was guilty of negligence, which was a proximate cause of the accident, are sustained by the evidence. No substantial conflict appears in the evidence in so far as material matters are concerned.

Placentia avenue runs north and south. Center street comes into it from the southwest at slightly less than a 90-degree angle, but does not extend beyond Placentia avenue. The paved portion of each street is about 18 feet wide. The intersection was entirely surrounded by orange trees, except for a garage and service station at the northwest corner. At the time of the accident, which happened shortly after 9 o'clock at night, the Chevrolet car containing the three boys, all of whom had been drinking and one of whom was moderately drunk, was coming south on Placentia avenue while the appellant's car, which had been coming east on Center street, was making a turn to the north on Placentia. The night was clear, and the pavement was dry. The appellant testified that as he approached the intersection he was driving on the right-hand or southerly side of Center street; that he checked his speed and was almost stopped as he arrived at the intersection; that as he entered the intersection he looked both ways and saw the Chevrolet car coming; that that car was then about 50 feet north of a 15-mile speed limit sign on Placentia avenue, which sign was 300 feet north of the intersection; that he gave a left turning signal, shifted into second gear, and proceeded to cross toward the easterly edge of Placentia avenue; that after passing the center of Placentia avenue he commenced to turn north and noticed that the other car was then 70 feet north of the intersection; that the Chevrolet had then commenced to swing to the easterly side of Placentia avenue; and that he then applied his brakes and had come to a stop when the collision occurred.

While some of the witnesses testified that the appellant's car was still moving at the time it was struck by the Chevrolet, it was either stopped or nearly so, and whether or not it was moving at the time is not material here. It appears, without conflict, that there was no stop sign at this intersection; that the appellant had crossed to the east side of Placentia avenue; that his automobile was on the extreme east portion of the pavement with the right front wheel on the shoulder at the time he was struck; that the collision occurred on the appellant's right-hand side of Placentia and at a point almost exactly opposite the north line of Center street; that there were no skid marks behind the Oldsmobile; that the Chevrolet had skidded with locked brakes a distance of 55 feet before the point of the impact; that the Chevrolet had crossed over almost to the east edge of the pavement on Placentia avenue where the impact occurred; and that it then struck the Oldsmobile with sufficient force to shove that car 10 or 12 feet in a southerly direction, at which point the Chevrolet overturned.

The driver of the Chevrolet admitted that he passed over to his wrong side of the street, where the collision occurred. This driver testified that he saw the appellant's car several hundred feet before it arrived at the intersection; that it was then going about twenty-five miles an hour; and that he then pulled over to the east side of the road because he thought the appellant would be unable to stop. While he testified at one time that he was 30 feet from the intersection, and at another time that he was 100 feet away, when he first saw the other car, he stated very positively that he was unable to estimate distances and always came back to the statement that he knew that he was farther north than the 15-mile sign when he saw the other car. It appears without conflict that this 15-mile sign was 300 feet north of the intersection. The driver of the Chevrolet further testified that he did not put on his brake immediately after he saw the other car, but that when he did put on the brake he was only going 15 miles an hour. Officers and other witnesses testified that his skid marks were 55 feet long, that they began on the westerly side of Placentia avenue, some 50 or 60 feet north of the intersection, and proceeded in a slanting direction to the point of impact near the easterly side of Placentia avenue.

In support of the judgment the respondents contend that the appellant's testimony, to the effect that he saw the other car when his own front wheels were about even with the west line of Placentia avenue, and that he then proceeded at a low rate of speed across to the east side of Placentia avenue, is, in itself, sufficient to show negligence which is a proximate cause of the accident. This argument leaves out of consideration the position of the other car at that time, and it is apparent that this evidence alone is not sufficient to sustain these findings. The respondents also rely upon the evidence of two witnesses who were at the time coming along Center street in an automobile, being about 600 feet west of the intersection at the time the collision occurred. Their testimony was to the effect that the appellant's car was moving at the time of the collision. As we have already pointed out, this fact is immaterial. These witnesses also testified that immediately before the impact they observed the lights of the appellant's car reflected on the side of the Chevrolet. While it is argued that this indicates that the Chevrolet must have been practically at the intersection when the appellant pulled into that street and started to make his left-hand turn, it is at once apparent that this testimony can relate only to the position of the cars for a split second before the impact, and that it throws no light on how or when they got into that position. The impact occurred near the north side of the intersection, and since the Chevrolet was proceeding at an angle toward the easterly side of Placentia avenue, and since the appellant's car was at that time on the east half of Placentia and facing in a northerly direction, the appellant's lights would be reflected on the side of the other car, although the time during which this could be seen by these witnesses, who were 600 feet back on a road lined with orange trees, would be very brief. However, these witnesses did not claim to have seen this for any length of time, and it is apparent from their testimony that they saw the same just as the collision occurred. We see nothing in the testimony of these witnesses to justify the inference that the Chevrolet was practically entering the intersection at the time the appellant entered the same. This is especially true in view of the evidence given by the driver of the Chevrolet as to his position when he first saw the appellant's car, that he did not apply the brakes at once, and that he later applied them, with the other evidence of the position and length of the skid marks made by that car and of the force with which the Oldsmobile was struck. The respondents further rely on testimony given by the appellant's wife to the effect that the Chevrolet was just out of the intersection when she first saw it. She was riding with the appellant, and she testified that when she first saw the Chevrolet that car was coming over to the east side of the road and that very nearly immediately after she observed it her husband brought his car to a stop. The fact that she did not observe the Chevrolet until it had started over toward the east side of Placentia avenue and at a time when the appellant's car was already on the east side of that street, if of any value at all, is some indication that the Chevrolet was not very close to the intersection at the time the respondents entered the same and made the turn, a fact which appears without real conflict in the other evidence. Great reliance is also placed upon the testimony of another witness to the effect that she heard the appellant's wife ask him after the collision whose fault it was, and that the appellant replied, "Well, we were going pretty fast my dear." Accepting this as true, although denied by the appellant, under the circumstances here appearing this produces no substantial conflict in the evidence upon the essential question here, when it appears without substantial conflict that the other car was more than 300 feet away at the time the appellant entered the intersection.

[2] Aside from the suggestion of speed, last referred to, the only negligence attributed to the appellant by the respondents is that he entered the intersection when he saw another car coming. If it can be said to have been negligence for the appellant to have entered this intersection when he saw another car more than 300 feet away or in "going pretty fast" while so doing, we are unable to see how either of these could be held to have been a proximate cause of the accident under these circumstances. The appellant had practically completed his turn and was proceeding north on his right side of the road when he was struck by the other car which was on its wrong side of the road. If, as claimed by the respondents, the Chevrolet was entering the intersection as the appellant's car entered the same, the collision could hardly have taken place where it did, and the appellant could hardly have crossed over to the east side of Placentia and arrived at a point near the north side of the intersection at the time of the impact. There is nothing to justify the inference that the two cars entered the intersection at about the same time, and the only inference which can reasonably be drawn from the evidence is that the Chevrolet was a considerable distance from the intersection at the time the appellant's car entered the same, and that it was traveling at a high rate of speed. If it be conceded that there is any evidence at all to show negligence on the part of the appellant, we are unable to see how any such negligence could, under the evidence, have been a proximate cause of the accident. The collision occurred not because of how or when the appellant arrived on his proper side of Placentia avenue, but because of the negligence of the other driver which resulted in his being on the wrong side of the road, without adequate cause or reason therefor. The court found that the driver of the Chevrolet was negligent, and we find no evidence in the record to justify an inference that such negligence was not the sole cause of the accident. In our opinion, the evidence is not sufficient to support a finding that any negligence of appellant was a proximate cause of the accident.

The appellant's further contention that the evidence shows contributory negligence on the part of the two passengers, which contention is based upon the claim that they knew prior to the accident that the driver of the Chevrolet was so under the influence of liquor as not to be able to drive properly, is not sustained by the evidence.

For the reasons given the judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.

2 Cal.App.2d 595

BACCIOCCO v. TRANSAMERICA CORPORATION et al.

Civ. 9192.

District Court of Appeal, First District, Division 2, California.
Dec. 5, 1934.

1. Pleading ⚷214(3)

Contract as alleged in complaint was admitted by demurrer thereto.

2. Contracts ⚷108(2)

Oral contract, whereby influential member of community was to buy stock of corporation at price below market price and to continue his previous written contract to buy stock of another corporation in consideration of promisees' guaranty that within three months stock of both corporations would sell on market at price which would enable promisor to recover all his moneys invested, *held* invalid, since contract was a fraud upon stockholders of both corporations and the public (Civ. Code, § 1667).

3. Contracts ⚷138(1)

One in pari delicto cannot maintain action for affirmative relief which would entail enforcement of illegal contract (Civ. Code, § 1667).

◆

Appeal from Superior Court, San Francisco County; James G. Conlon, Judge.

Action by Joseph Bacciocco against the Transamerica Corporation and others. From a judgment for defendants, plaintiff appeals. Affirmed.

M. Mitchell Bourquin, of San Francisco (Clinton L. Markley, of San Francisco, of counsel), for appellant.

Louis Ferrari and W. E. Johnson, both of San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued for damages for breach of an alleged oral contract. The defendants' demurrer to the amended complaint was sustained without leave to amend and judgment for them followed. The appeal is on the judgment roll.

The amended complaint alleges generally that on April 3, 1928, the defendants persuaded plaintiff to enter into a written contract with Bancitaly Corporation for the purchase of 589 shares of the capital stock of the Bank of America N. A. at $225 per share, payments to be made in designated installments. This contract permitted the buyer, after being in default for a period of sixty days, to demand the refund of all installments of principal theretofore paid. It is alleged that this plaintiff became in default and demanded the refund of the money paid; that the defendants acknowledged his demand and drew a draft to his order in the full sum due; but that the defendants then importuned plaintiff not to relinquish his stock and represented to him that, as he was an influential member of the community and had many friends who held similar contracts, his withdrawal from "the enterprises of the defendants" would cause many other subscribers and holders of similar contracts to withdraw to the damage of defendants. It is then alleged that at said time the oral contract which is the basis of this action was made wherein the defendants promised that if plaintiff would purchase 2500 shares of the Transamerica Corporation at $40 a share (the stock then selling on the open market between $44 and $45 a share) and would continue his contract with the Bancitaly Corporation "the defendants would promise, agree and guarantee that within three (3) months the said shares of stock of the Bank of America N. A., and of the Transamerica Corporation above mentioned would sell on the market at a figure or price at which said stocks could be sold and recover for plaintiff all the moneys invested in the said instalment contract and in said twenty-five hundred (2500) shares of Transamerica Corporation." Allegations follow that within the period of three months thereafter the said shares did not sell on the market at the price promised by defendants, but that the price thereof broke and declined so that plaintiff was obliged to sell his holdings at a loss.

[1] It is apparent that the gravamen of the action is the alleged unconscionable contract between the parties interested in maintaining in the public market a selling price for these stocks above their real value. The contract as alleged, which, of course, is admitted for the purpose of the demurrer, was a fraud upon the other stockholders of both corporations and a fraud upon the public generally. By this bargain the plaintiff sought to induce the stockholders of Bancitaly Corporation to refrain from disposing of their stock and to lead the public to buy shares of the Transamerica Corporation at a fictitious and unfair price.

[2] There are no allegations that the plaintiff entered into the contract through duress, menace, undue influence, or misrepresenta-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

tions. The pleading plainly states that, in consideration of plaintiff's obtaining the Transamerica stock at a price $4 below the market, he would lend his name and influence to a fraudulent scheme to boost the stock on the market to such a price that he could sell out at a handsome profit to the detriment of his friends and business associates who would be left "holding the sack." Such a contract, being contrary to good morals, is expressly declared to be unlawful by section 1667 of the Civil Code.

[3] For these reasons the appeal from the judgment is controlled by the established rule that one "in pari delicto" cannot maintain an action for *affirmative* relief which would entail the enforcement of an illegal contract. 6 R. C. L. p. 823; 6 Cal. Jur. §§ 72, 108; Restatement of the Law of Contracts, § 598; Gugolz v. Gehrkens, 164 Cal. 596, 605, 130 P. 8, 43 L. R. A. (N. S.) 575; Bank of Orland v. Harlan, 188 Cal. 413, 421, 206 P. 75; Takeuchi v. Schmuck, 206 Cal. 782, 786, 276 P. 345.

The judgment is affirmed.

I concur: STURTEVANT, J.

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2 Cal.App.2d 410

ROWLAND et al. v. COLUMBIA MINING, WATER & POWER CO. OF CALIFORNIA.

Civ. 5047.

District Court of Appeal, Third District, California.

Nov. 26, 1934.

1. Fraud 🔑11(1)

Owner's representation to prospective lessees that placer mine in district where large returns have been obtained in so-called "virgin ground" has not been previously worked for minerals contained therein is statement of fact, not of opinion, as respects question of fraud (Civ. Code, § 1572, subd. 2).

2. Fraud 🔑43

In damage action, complaint substantially alleging that defendant owner of river bed, to induce plaintiffs to enter into mining lease, represented that ground had never been mined for gold or precious metals and was valuable for mining purposes, that defendant knew representations were untrue as to premises not having been previously worked, that plaintiffs relied on representations, and that returns for mining operations amounted only to $10, *held* not demurrable (Civ. Code, § 1572, subd. 2).

3. Fraud 🔑58(1)

Evidence *held* to support findings that president and manager of corporate owner of river bed represented to plaintiffs that the property had never been mined for the minerals contained therein, that plaintiffs in entering into lease relied on such statement, and that the statement constituted actionable fraud even if such president and manager believed it to be true (Civ. Code, § 1572, subd. 2).

4. Fraud 🔑60

In damage action by lessees against owner for fraudulent representations as to mining property, plaintiffs *held* not entitled to recover sum expended by them in unsuccessful mining, which sum was advanced to them by third persons, where, under agreement between plaintiffs and third persons, latter could look for repayment or compensation only to the gold that might be recovered in mining (Civ. Code, § 1572, subd. 2).

5. Appeal and error 🔑719(6)

Appellant may not question sufficiency of evidence to support findings where appeal is presented on bill of exceptions and bill contains no specifications of want of testimony to support the findings (Code Civ. Proc. § 648).

6. Fraud 🔑60

In damage action for alleged fraudulent representations inducing plaintiffs to enter into mining lease which brought no returns, where two of plaintiffs gave up salaried positions so as to engage in mining operations on leased premises, loss of such salaries *held* proper element of damage (Code Civ. Proc. § 648).

◆

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Action by P. J. Rowland and others against the Columbia Mining, Water & Power Company of California. Judgment for plaintiffs, and defendant appeals.

Judgment reduced and, as reduced, affirmed.

O. F. Meldon, of Sacramento, Halverson & Halverson, of Los Angeles, and White, Miller, Needham, Harber & Mering, of Sacramento, for appellant.

Rowan Hardin, of Sonora, and Grant & Zimdars, of San Francisco, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiffs had judgment against the defendant for and on account of alleged fraudulent representations concerning certain mining property situate in the county of Tuolumne. From this judgment the defendant appeals.

[1, 2] The complaint alleges that the defendant at the time of the commencement of the action was, and for many years previously had been, the owner of certain mining property consisting of the river bed of the south fork of the Stanislaus river just above the forks of said river with the north fork, and commencing at a point on the bed of the south fork of the river immediately beneath the point where the power line of the Pacific Gas & Electric Company crosses the south fork of the river, and extending thence up the bed of the river approximately 2,000 feet to the easterly and northerly extremity of the property.

The property in question is alleged to be susceptible to mining operations during those periods when the river bed is not covered by water to such a depth as to prevent the working of the ground for mining purposes.

It is further alleged in the complaint that on the 16th day of April, 1926, and on many days prior thereto, the defendant corporation, through its officers, stated and represented to the plaintiffs, for the purpose and object of inducing these plaintiffs to enter into a contract for the working of said mining ground so owned by said defendant corporation, that the ground had never been mined for gold or precious metals, and was valuable for mining purposes because of the gold contained therein.

It was further represented, according to the complaint, that said river bed had not been worked on account of the depth of the water flowing over the same, but that, since the recent building of a certain dam in said river by the Pacific Gas & Electric Company, and diverting the water from said stream, it was possible to mine the river bed referred to. The complaint further alleges that representations and statements were made that the gold to be extracted from the premises would afford large returns and compensation for the money expended in mining the same. It is further alleged that the plaintiffs relied upon the statements that said ground had not previously been worked, and that no mining operations had been carried thereon, save and except along the banks of said river above low-water mark; that the representations were untrue; that the plaintiffs, relying upon the representations, and believing that the same were true, entered into a lease with the defendant corporation for the carrying on of mining operations on said property, and expended large sums of money in such operations; that the returns for such operations amounted to only the sum of $10, and that, after the beginning and carrying on of mining operations in the bed of said river, the plaintiffs discovered, by the finding of shovels, nails, and other objects on the bedrock of said river, that the premises leased from the defendant had previously been mined.

It is further alleged that the defendant knew that said representations and statements as to said mining premises not having been previously worked were untrue, and were made for the purpose of inducing the plaintiffs to enter into the lease for the operation of said premises.

The lease entered into between the plaintiffs and the defendant, set out in the record is quite lengthy, but in substance it provided for the plaintiffs raising so much money to begin operations and to conduct mining operations upon the premises referred to, yielding to the defendant a certain percentage of the gold that might be secured as a result of such mining operations.

In pursuance of the lease just referred to the plaintiffs entered upon and conducted mining operations, and expended in so doing a sum of money somewhat in excess of $15,000, when the explorations revealed the fact that the premises covered by the lease had been formerly mined.

Upon this appeal two propositions are presented for consideration in the statement of questions involved, to wit:

I. "May one rely upon a merely speculative representation concerning an undertaking that is known to be hazardous and uncertain, where the speaker is known not to have any expert qualifications concerning the subject-matter, and where the source of the speaker's information was made known by the speaker to the one alleged to be defrauded?"

II. "Where the speaker makes known his source of information concerning the representations, and the one alleged to be defrauded investigates these sources without hindrance, may the plaintiffs rely upon subdivision 2 of section 1572 of the Civil Code as a basis of an action for fraud, especially where the representations concern a mining venture, where it is not claimed that the speaker had any expert knowledge?"

As we read the record, the foregoing statement of the questions involved is not strictly accurate. If the questions presented involved simply the opinion of the speaker as to the value of the property, or of the minerals contained therein, then and in that case the statement of the questions involved might be considered as correct. However, where the record shows a statement of a fact which involves an unworked placer mine in a district where large returns have been obtained in what is called "virgin ground," an entirely different situation is presented from a mere statement or declaration as to the value of a quartz mining claim, or even of a placer mining claim, where large values have not been obtained from adjoining properties. The fact that property so situate has not been previously worked in order to obtain the minerals therein contained is the leading factor, we think, in determining whether one would or would not embark in the undertaking of mining such property. The statement that such property has not been worked is a statement of a fact, and is in no sense of the word a statement of an opinion.

A reading of the complaint leads us to the conclusion that the defendant's demurrer thereto was properly overruled.

[3] That the testimony is sufficient to support the finding of the trial court as to the statement of fact that the property had not been worked, and that the plaintiffs relied upon the statement, and that it constituted actionable fraud as defined in subdivision 2 of section 1572 of the Civil Code, we quote both from that given by the defendant as well as that introduced on behalf of the plaintiffs:

W. H. Mahony testified that he first went upon the property in question in 1882, when it was owned by a Mr. Estee, a friend of his; that he had been interested in the property about 20 years; that, since knowing the property, he had sought information from old-timers, many of whom were then alive, who had worked about the river, and he had formed the definite conclusion that the part of the Stanislaus river he subsequently leased to plaintiffs had not been mined; that the defendant corporation had owned the property since 1923; that he carried on the negotiations by virtue of authority given to him in a resolution adopted by the corporation; that he was the president and manager of the defendant corporation; that he showed plaintiff Rowland letters from persons who had examined the property, and told Rowland that in times past mining operations could not be carried on in the south fork of the Stanislaus river because of the large flow of water; and that the water formerly flowing in the river had now been diverted. Mr. Mahony also testified that he had talked with a Mr. Napoleon, an old-timer, who told him that the river had never been worked below "Nigger Gulch," and that Mr. Smith had said the same thing. Mr. Mahony further testified that he never heard of the Boronio claim until the testimony of Mr. Napoleon at the trial of the instant case. (Nigger Gulch mine is just above and up the river from the property leased to the plaintiffs.)

Mr. Napoleon's testimony upon this subject is as follows: That he had lived in the neighborhood of Columbia since 1853, and had known Mr. Mahony for 18 or 20 years, and had frequently seen him during that time; that he had talked with Mr. Mahony on many occasions about the south fork; that he knew the south fork had all been mined out, except the Boronio and Spring claims. The Boronio claim was at the juncture of the south fork and middle fork of the main river, and about 200 feet up the south fork from the south line of the middle fork, and was below and down the stream from the Pacific Gas & Electric power line, and that the south fork of the river of the Pacific Gas & Electric power line had been mined out, except the Spring claim, which was about a mile farther up the south fork.

Napoleon also testified that Ben Zachary mined the river below the Boronio claim, and this mined-out ground was the ground leased to plaintiffs, and that the Texas-Boronio claim was worked by the Knox Bros. Referring to the leased property, the witness testified as follows (to inquiries propounded by the court):

"Q. Is that the part of the river that you told Mr. Mahony had been mined out? A. This here above, yes sir.

"Q. This above the transmission line or the south fork, is that correct? A. Yes sir."

Upon cross-examination it appears that the witness Napoleon testified as follows: To a question by Mr. Mahony whether the south fork above the forks of the river except the Boronio claim had been mined out, Mr. Napoleon answered: "I may have told you that; that it had been mined; and if I didn't tell you, I will say now that it was."

Preceding the execution of the lease, Napoleon testified, further, that Mr. Mahony had driven up to his place with the plaintiffs; that the plaintiffs stayed outside while Mr. Mahony came in to see him, and that Mr. Mahony said he had his parties and they seemed highly pleased and wanted him to tell them what he knew about the claim. Mr. Napoleon said he recommended the Boronio claim. The testimony further is that at this meeting with Mr. Napoleon which had been arranged by Mr. Mahony, and at which Mr. Napoleon recommended the Boronio claim as a good claim, Mr. Mahony said to plaintiffs Rowland and Charles Scanlan, Sr.: "You have just heard what Mr. Napoleon had to say about the Boronio claim never having been worked. The property I have proposed to lease to you gentlemen is a part of this Boronio claim." Napoleon stated that Mr. Rowland then said that he was satisfied.

All of the plaintiffs testified, in substance, that they invested their money in the project upon the statements that the property leased to them had not been mined, except on the rims, and that the gravel below the water level and on bedrock was what is called "virgin ground," or ground that had never been worked, and that, if they had not placed reliance upon the statements made to them by Mr. Mahony, they would not have spent any money on the project.

Mr. Rowland testified that Mr. Mahony told him that he had known the property for a long time, and during that time the property had never been worked; that he had showed him letters of different persons who had examined the property, and explained, in times past, mining operations could not be carried on in the river there because of the large flow of water; that the amount of the water flowing in the river had been greatly reduced through the construction of dams for power purposes; and that the water formerly flowing in the river had been diverted. Mr. Rowland also testified that Mr. Mahony was emphatic in saying that the bed of the river had never been worked; that during the last few years the Pacific Gas & Electric Company had built a dam and diverted the water from the south fork of the river so that the ground could be worked. The other plaintiffs testified to substantially the same facts. Mr. Rowland further testified that he wanted first to prospect the ground, but Mahony objected to this, and assured him that there was no need of so doing.

The testimony also shows that the plaintiffs knew practically nothing of mining placer claims, and that in the operations under the lease the plaintiffs expended the sum of $15,251.87, including wages and salaries. Of this amount the court found that the sum of $14,200 was properly expended by the plaintiffs for equipment and mining operations upon the leased premises.

From the testimony given by Napoleon, the court could not conclude otherwise than that Mahony had given Napoleon to understand that the land about to be leased to the plaintiffs was the Boronio claim which had never been worked, whereas in truth and in fact the premises leased did not include any portion of that claim, but were situate farther up the river.

Irrespective of what Mahony may have believed, we think his representations came squarely under the provisions of subdivision 2 of section 1572 of the Civil Code, which reads: "The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true." Such a statement by the section referred to constitutes actual fraud and lays the basis for the recovery of damages.

A number of cases are cited by the appellant which have to do with representations as to the value of quartz mining claims, but those cases are not controlling here, for the simple reason that the representation in the instant case does not rest upon the question of value. The representation was a statement of a fact that the property had not been previously mined.

We think the rule applied in the following cases is pertinent to the questions here presented:

In the case of Edge v. Bryan, 47 Cal. App. 312, 190 P. 476, in an action for fraudulent representations, the court held as follows (quoting from syllabus): "A representation by the vendor to the vendee that the land agreed to be sold was 'virgin' soil was an expression of fact, and not one of opinion, where, on being asked what 'virgin soil' meant, the vendor said that it 'had been a sheep pasture and never cultivated.'"

To the same effect is the case of French v. Freeman, 191 Cal. 579, 217 P. 515; Teague v. Hall, 171 Cal. 668, 154 P. 851; Stone v. McCarty, 64 Cal. App. 158, 220 P. 690, where the question of representations was thoroughly considered by this court. In the case of Stone v. McCarty, supra, the representations were made as to the quality of the soil, trees growing thereon, the selling price of the trees, etc. Other cases might be cited to the same effect showing the difference between the statement of a fact and the expression of an opinion. Ordinarily, expressions of the value or the profits to be obtained are expressions of opinion, but the expressions of what has, or what has not, been done with the property constitute statements of facts.

[4] It appears from the record that the plaintiffs entered into an agreement with E. S. Garrett and A. B. Chapman, by virtue of which agreement Garrett and Chapman advanced to the plaintiffs the sum of $6,600. Their compensation for so doing was to receive a certain percentage of the gold that might be obtained from working the leased premises. In considering this agreement, the court made the following finding: "That it is true that plaintiffs secured $6,600.00 of the funds expended by them, as herein found, from one E. S. Garrett and one A. B. Chapman, under arrangements and agreements made between plaintiffs and the said Garrett and Chapman, but that said defendant did not in any wise participate or have any concern in said agreements and they were purely and simply transactions between the plaintiffs and said Garrett and Chapman; nor was there any agreement of any kind between the said Garrett and Chapman, or either of them, and the defendant, relative to the said $6,600.00 or any part thereof so secured by plaintiffs from Garrett and Chapman; and said agreement so made between the plaintiffs and said Garrett and Chapman did not entitle the said Garrett and Chapman to any active participation in the mining operations nor did it create any contractual relation of any kind whatsoever between said Garrett and Chapman, or either of them, and the defendant."

This sum was included in the judgment awarded to the plaintiffs. The finding itself shows conclusively that the defendant had no negotiations with either Garrett or Chapman. The finding does not show that the plaintiffs are obligated to repay Garrett or Chapman any moneys whatever on account of such advances.

The respondents argue that the plaintiffs agreed to repay Garrett and Chapman out of any moneys recovered. The record does not bear out such argument. Garrett and Chapman, as we have said, could look only to the gold that might be recovered for repayment or compensation for moneys advanced in aid of the enterprise. The finding itself, we think, shows conclusively that the sum of $6,600 should not have been included in the judgment.

[5] The appellants make the further contention that there is no evidence supporting the finding of the court relative to the sum of $4,819.68, charged for equipment placed on the premises, and that the judgment is excessive in such amount. In making this contention, appellants overlook the specification of errors. A reference to the record shows that no specification of errors as to the insufficiency of the evidence to support the findings of the court are set forth, save and except as to certain matters set forth in finding No. 1. These specifications are as follows: That Mahony was one of the principal stockholders; that Mahony had not represented that the ground was virgin ground or had not been mined before; that no representations of fact were made by the defendant; that there is no evidence that the plaintiffs relied upon any statements of fact made by the defendant; that the evidence shows that the representations of fact made by the defendant were true; that there is no evidence that any representations of fact with reference to the previous conditions of the river were untrue; that the evidence does not show that the ground in the river bed below low-water mark had ever been mined; that there was no evidence to show that the plaintiffs expended the sum of $14,200, or any greater sum than $8,200; and that the evidence further showed that of the moneys actually advanced by the plaintiffs $1,800 was withdrawn as salaries for Rowland and Charles Scanlan.

The finding as to the equipment was contained in finding No. 4, to which no specifications of error are addressed, nor is there any specification of any lack of testimony in any of the findings to support the item referred to. While there is a specification that the sum of $8,200 is all that is shown by the testimony to have been expended, there is no specification as to the different items, save and except as to the $1,800. The court eliminated from some item the sum of $1,051.87. Just what item was reduced in this amount the record does not disclose.

Under the provisions of section 648 of the Code of Civil Procedure, this court is precluded from considering the want of testimony to support a finding where there is no specification of errors setting forth such fact in the record. The rule is well settled that an appellant may not question the sufficiency of the evidence to support the findings where the appeal is presented upon a bill of exceptions, and the bill contains no specifications of the want of testimony to support the findings. Latta v. Da Roza, 100 Cal. App. 606, 280 P. 711, 281 P. 655; 2 Cal. Jur. p. 708; Akley v. Bassett, 189 Cal. 625, 209 P. 576; Schultz v. City of Venice, 200 Cal. 50, 251 P. 913.

[6] As to the salary of two of the plaintiffs, the record shows that they gave up positions where they were earning such salaries in order to engage in mining operations upon the leased premises. The loss of this salary would certainly be a damage occasioned by the entering into of the lease referred to, based upon the statements and misrepresentations made by the president of the defendant corporation.

It follows from what we have said that the judgment should be reduced by striking therefrom the sum of $6,600, and it is so ordered. This leaves the amount to which the plaintiffs are shown to be entitled to recover the sum of $7,600, and as to that amount the judgment is affirmed.

The respective parties will defray their own costs on appeal.

We concur: PULLEN, P. J.; THOMPSON, J.

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2 Cal.App.2d 612

KOSTER v. LOCAL NO. 33, INTERNATIONAL ALLIANCE THEATRICAL STAGE EMPLOYEES AND MOTION PICTURE MACHINE OPERATORS OF UNITED STATES AND CANADA.

Civ. 8837.

District Court of Appeal, Second District, Division 2, California.
Dec. 5, 1934.

1. **Appeal and error** 🔑854(3)

Where demurrer may be sustained on any ground, order sustaining demurrer will not be disturbed on appeal.

2. **Appeal and error** 🔑195

Where demurrer to petition was sustained without leave to amend, and leave to amend was not requested, appellate court cannot reverse judgment on ground leave was not granted.

3. **Appeal and error** 🔑758(3)

Where special and general demurrers were interposed to petition, and court in general order sustained demurrer without leave to amend, appellate court cannot assume trial court was wrong, in absence of any mention of special demurrers in appellant's brief.

4. **Appeal and error** 🔑758(3)

Where special demurrer was not referred to by either party to appeal other than in general way, and neither discussed merits of special demurrer in briefs, appellate court was not required to make independent examination of ruling on special demurrers.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Mandamus proceeding by Sid Koster against Local No. 33, International Alliance Theatrical Stage Employees and Motion Picture Machine Operators of United States and Canada. From a judgment in favor of the defendant, the petitioner appeals.

Judgment affirmed.

C. M. Walz, of El Cajon, for appellant.

James S. Roche, of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

This proceeding arose through a petition in mandate to compel the reinstatement of petitioner after his expulsion from a labor union and for damages for such expulsion. The petition reached the stage of a second amended petition, and special and general demurrer were interposed thereto, the court in a general order sustaining the demurrer without leave to amend. No request to amend was made, and in about twelve days after such order judgment for the union was made and entered. Petitioner appeals, and in his brief claims that his petition shows him to be a member of the union in good standing and that he has financial and other definite rights by reason of such membership; that he was expelled without cause and for an alleged reason not included in the prescribed causes for expulsion; and that the whole charge and act of expulsion was the execution of a prearranged and fraudulent scheme to put petitioner out of the union.

[1-4] It would seem that allegations to the above effect would be sufficient as against a general demurrer, but this does not solve the problem. We still have the special demurrer to contend with, and as neither party to this appeal has furnished us with any reference to any special demurrer other than in a general way, and neither has discussed the merits or demerits of the special demurrer in their briefs, we have nothing before us upon which to premise any ac-

tion. It was said in Haddad v. McDowell, 213 Cal. 690, 3 P.(2d) 550, 551, that if the demurrer is "sustainable upon any ground, it will not here be disturbed"; but see the quotation in the same case, at page 693 of 213 Cal., 3 P.(2d) 550, 551, from Barker v. Freeman, 85 Cal. 533, 24 P. 926: "The demurrer was sustained without leave to plaintiff to amend his complaint. It does not appear that plaintiff asked leave to amend his complaint, and we cannot reverse the judgment on the ground that leave was not granted when none was asked." In the circumstance we do not feel called upon to analyze the petition in the light of the special demurrers. Twice before the complaint had been found vulnerable against demurrers, and in the absence of any mention of the special demurrers in appellant's brief we cannot assume that the trial court was wrong. Should we make an independent examination of and ruling on the special demurrers, we would be doing so without the benefit of appellant's reasons for believing the court's ruling to be wrong, and without the benefit of respondent's reply thereto. This we think we should not do.

Judgment affirmed.

We concur: CRAIL, J.; SCOTT, Justice pro tem.

STEWART v. WAGENBACH et al. *

Civ. 8614.

District Court of Appeal, Second District, Division 1, California.

Nov. 20, 1934.

Hearing Granted by Supreme Court Jan. 17, 1935.

1. **Automobiles ⇨224(1)**

Automobile passenger has duty to exercise due care for his own safety.

2. **Automobiles ⇨224(5)**

Automobile passenger who had ridden more than a quarter of a mile at speed of 50 miles per hour on winding road through dense fog without protesting to driver or requesting to leave automobile *held* guilty of contributory negligence precluding recovery for his death from resulting accident.

3. **Trial ⇨397(1)**

Findings *held* not defective because court did not specifically find that the deceased's negligence "proximately contributed" to the accident, where court found deceased guilty of "contributory negligence," which means negligence of injured party that contributed proximately with negligence of one charged to produce injuries complained of.

[Ed. Note.—For other definitions of "Contributory Negligence," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Rita F. Stewart against Karl C. Wagenbach, also known as Charles Wagenbach, and another. From an adverse judgment, plaintiff appeals.

Affirmed.

N. D. Papa-Dakis and C. S. Mauk, both of Los Angeles, for appellant.

Paul Nourse and Forrest A. Betts, both of Los Angeles, for respondents.

HAHN, Justice pro tem.

This action is one wherein plaintiff sought damages for the death of her minor son, of the age of 18 years, which it is alleged was caused by the gross negligence of defendant Erwin Wagenbach, in whose automobile deceased was riding at the time he received injuries which caused his death.

Defendants, in addition to denying the allegations of negligence, in their answer set up the plea of contributory negligence on the part of the deceased. The court found in favor of plaintiff on the issue of gross negligence, and in favor of defendants on their plea of contributory negligence. From this judgment plaintiff appeals, urging that the evidence does not support the findings of contributory negligence on the part of deceased.

The accident in which deceased lost his life occurred about 1 o'clock in the morning while he and two young lady friends were returning home in a one-seated automobile driven by defendant Erwin Wagenbach. So dense was the fog which prevailed that the lighted street lamps were barely visible to the occupants of the automobile, nor could the driver see the roadway more than 30 feet ahead of his car. While driving at a speed of 50 miles per hour along this highway, which was known to be beset with curves, the car crashed into the street curb at one of these curves. Deceased was thrown from the car, striking the pavement with such force as to cause injuries which resulted in his death. At no time did deceased protest the speed at which the car

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⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 47 P.2d 267.

was being driven, or request that he be allowed to leave the car.

Appellant's main point on her appeal is that the evidence does not support the court's finding that deceased was guilty of contributory negligence in failing to protest to the driver because of the excessive speed, or in failing to demand opportunity to leave the car. In addition to the general considerations urged in support of this contention, it is urged that deceased did not have sufficient time after the high speed was attained within which to make protest before the crash occurred.

That the driver of the car was guilty of gross negligence in driving the car at a speed of 50 miles per hour under the conditions existing is not questioned. It would be difficult to conceive of conditions more clearly fraught with danger to the occupants of a car moving at 50 miles an hour than those which affected the car in which deceased was riding on the night of the accident. Whether or not under all the circumstances deceased in the exercise of due care was required to make protest to the driver was a question to be decided by the trial court from the evidence and the inferences to be drawn therefrom. Curran v. Earle C. Anthony, Inc., 77 Cal. App. 462, 247 P. 236; Shields v. King, 207 Cal. 275, 277 P. 1043; Parmenter v. McDougall, 172 Cal. 306, 156 P. 460, and cases there cited; Bresee v. Los Angeles Traction Co., 149 Cal. 131, 85 P. 152, 5 L. R. A. (N. S.) 1059.

[1] The duty of a passenger in an automobile to exercise due care for his own safety is too well established to require citation of authority. The principle underlying this rule has been succinctly stated as follows: "No one can be allowed to shut his eyes to danger in blind reliance upon the unaided care of another, without assuming the consequences of the omission of such care." Fujise v. Los Angeles Ry. Co., 12 Cal. App. 207, 107 P. 317, 320; Parmenter v. McDougall, 172 Cal. 306, 156 P. 460.

[2] There is evidence in the record that the speed of 50 miles per hour was maintained for more than a quarter of a mile immediately before the crash. To the trial court is particularly intrusted the duty and task of weighing the evidence and determining its worth. Upon the evidence, we do not feel warranted in disturbing the findings of the court.

[3] There is no merit in appellant's point that the findings are defective because the court did not specifically find that the negligence of deceased "proximately contributed" to the accident. The court found the deceased guilty of "contributory negligence." The term contributory negligence means negligence on the part of the injured party that contributed proximately with the negligence of the one charged to produce the injuries complained of.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

FERRYBOATMEN'S UNION OF CALIFORNIA v. SOUTHERN PAC. CO. et al.

Civ. 9194.

District Court of Appeal, First District,
Division 2, California.
Nov. 23, 1934.

As Modified on Denial of Rehearing Dec. 22, 1934.

Hearing Granted by Supreme Court
Jan. 21, 1935.

1. **Courts ⚷17**

Where trial court did not have jurisdiction of subject-matter of action, it did not have jurisdiction to hear any other action resting on same facts, and action was properly dismissed.

2. **Action ⚷35**

Where statute creates new and independent obligation and provides remedy for enforcement thereof, statutory remedy is exclusive and must be strictly followed.

3. **Courts ⚷489(1)**

Action by labor union to enforce award of arbitrators under Railway Labor Act *held* not within jurisdiction of state courts; federal courts only having jurisdiction (Railway Labor Act [45 USCA § 151 et seq.]).

Appeal from Superior Court, San Francisco County; Daniel C. Deasy, Judge.

Action by the Ferryboatmen's Union of California against the Southern Pacific Company and others. From a judgment dismissing the action, the plaintiff appeals.

Judgment affirmed.

Derby, Sharp, Quinby & Tweedt and Joseph C. Sharp, all of San Francisco, for appellant.

Henly C. Booth and A. A. Jones, both of San Francisco, for respondents.

STURTEVANT, Justice.

A controversy arose as to wages, etc., between the defendant railroad companies and their employees. The parties could not between themselves settle the controversy. Therefore they entered into an agreement to arbitrate the entire controversy. Thereafter a board of arbitration was appointed; it held hearings and later duly prepared, served, and filed its award in the United States District Court for the Northern District of California. Thereafter in due time the railroad companies filed in said court a petition to impeach the said award. Their petition was dismissed and the companies appealed to the Circuit Court of Appeals for the Ninth Circuit, but that court affirmed the order of dismissal. Atchison, T. & S. F. Ry. Co. v. Ferryboatmen's Union of California, 28 F.(2d) 26. Pending the appeal the plaintiff alleges that the parties entered into an agreement whereunder the parties advanced the effective date on the eight-hour per day basis from November 1, 1927, to March 1, 1928, and they also agreed that if the order appealed from was affirmed that the eight-hour day be put into effect for all of "said former 12-hour men" as of March 1, 1928. The plaintiff further alleges that from September 1, 1928, the defendants continued to employ all "said former 12-hour men" on daily watches averaging twelve hours per day notwithstanding said award and said agreement. After the Circuit Court of Appeals affirmed the order of the District Court, the latter adopted the said agreement of the parties and incorporated it therein, and on September 29, 1928, it entered a judgment on the award as modified by the stipulation of the parties. It is further alleged that the last-mentioned judgment has never been modified, etc., but is a final and subsisting judgment. Continuing the plaintiff places its construction on the award as so established by said final judgment and it prays for judgment "* * * declaring the respective rights and duties of the parties under the contract, agreements and writings above referred to and setting forth a binding declaration of the same, and of the amounts due plaintiff thereunder and for a judgment against said defendant (Southern Pacific Company) for the sum of $67,564.56 and interest thereon at seven per cent. per annum from March 5, 1931, until paid." Similar prayers, differing only in the amount of dollars and cents, are inserted as to each other defendant. By their answers the defendants place their construction on the same document and aver that they have fully complied with the terms of the award. After the plaintiff had made a very exhaustive opening statement, the defendants objected to the hearing of the action because it then appeared that the trial court had no jurisdiction because of the provisions of the Railway Labor Act (45 USCA § 151 et seq.), and thereupon they made a motion that the action be dismissed. In making that motion they made numerous specifications which, among others, included these: (1) That the Railway Labor Act is a comprehensive statute creating new rights and prescribing remedies and that such remedies are therefore exclusive. Such being the fact, as state courts are not mentioned, state courts have no jurisdiction. (2) That under the Railway Labor Act it is provided that if a dispute arises regarding the meaning or application of an award such dispute can and will be referred to the board of arbitration or a subcommittee thereof. The motion was granted and the plaintiff has appealed under section 953a of the Code of Civil Procedure.

In presenting its case on appeal the plaintiff addresses itself to a refutation of the second ground of the defendants' motion as above stated. The defendants reply by addressing themselves primarily to the first ground and incidentally to the second ground. In what follows we will endeavor not to overlook basic points and arguments and we will endeavor to discuss each one. But it will readily be appreciated that inadvertently we may overlook some incidental matters.

[1] If the trial court did not have jurisdiction of the subject-matter, its ruling should be affirmed. 9 Cal. Jur. 550. When the opening statement had been made it was clear that all three counts pleaded in the plaintiff's complaint rested for support on the same set of facts and that the first count specifically pleaded those facts. If the trial court did not have jurisdiction to hear an action involving those specific facts, it did not have jurisdiction to hear any other action resting on those same facts. We will therefore address ourselves to the first count, which, as we have stated, presents all the facts.

Before proceeding it is best to make clear some matters which are clouded. The record presents assertions on the part of the plaintiff that the parties do not disagree regarding the meaning or application of the award. It also presents assertions on the part of the defendants that they do not agree. That apparent discrepancy arises out of a distinction stated by counsel for the plaintiff to the trial court. The statement was: "We are here because of the difference of interpretation as to what the *judgment and agreement* fixed as the date of the application of the award. The evidence will show that there is no uncertainty in the *award*." (Italics ours.) In other words, conceding the award as filed by the arbitrators to be free from uncertainty, nevertheless when the parties entered into the stipulation filed May 22, 1928, and thereafter on September 29, 1928, a judgment was entered, thereupon a difference did arise. An examination of paragraph 9 of plaintiff's complaint and the answer thereto reenforces the statement just made.

[2, 3] Formerly such a controversy as is presented by the record was not justiciable. In recent years several acts on these subjects have been passed by the Congress. As the subject-matter was a specialty of which the parties were the most competent authorities, the Congress called them before it and sought to obtain from the parties the information necessary to frame legislation and the consent and support of the parties in framing such legislation. Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks, 281 U. S. 548, 50 S. Ct. 427, 431, 74 L. Ed. 1034, and marginal notes. Moreover, organized labor has for many years sought the right to settle its disputes by conference and arbitration and not to resort to the courts. In 1926 the congress passed the Railway Labor Act. In Texas & N. O. R. Co. v. Brotherhood of Ry. S. S. Clerks, supra, after reviewing the history of the legislation on these subjects, Mr. Chief Justice Hughes, speaking for the court, said: "While adhering in the new statute to the policy of providing for the amicable adjustment of labor disputes, and for voluntary submissions to arbitration as opposed to a system of compulsory arbitration, Congress buttressed this policy *by creating certain definite legal obligations.* The outstanding feature of the Act of 1926 is the provision for an enforceable award in arbitration proceedings. The arbitration is voluntary, but the award pursuant to the arbitration is conclusive upon the parties as to the merits and facts of the controversy submitted. Section 9 (45 USCA § 159). The award is to be filed in the clerk's office of the District Court of the United States designated in the agreement to arbitrate, and unless a petition to impeach the award is filed within ten days, the court is to enter judgment on the award, *and this judgment is final and conclusive.* Petition for the impeachment of the award may be made upon the grounds that the award does not conform to the substantive requirements of the act or to the stipulation of the parties, or that the proceedings were not in accordance with the act or were tainted with fraud or corruption. *But the court* is not to entertain such a petition on the ground that the award is invalid for uncertainty, and in such case the remedy is to be found in a submission of the award to a reconvened board or to a subcommittee thereof for interpretation, as provided in the act. Thus it is contemplated that the proceedings for the amicable adjustment of disputes will have an appropriate termination *in a binding adjudication, enforceable as such.*" (Italics ours.) In People v. Craycroft, 2 Cal. 243, at page 245, 56 Am. Dec. 331, the court said: "Where a right is given, and a remedy provided by statute, the remedy so provided must be pursued. It is true, if the right existed at common law, the plaintiff might pursue either remedy, the statutory one being regarded merely as cumulative. Here a new and independent obligation has been created; and the statute must be strictly followed." In Reed v. Omnibus R. Co., 33 Cal. 212, at page 216, the court said: "It is a matter of no moment, so far as the jurisdictional question is concerned, whether the forfeiture of two hundred dollars, provided for in the Act of 1863, is treated as a penalty for extortion, as claimed by the defendant, or as liquidated damages, as claimed by the plaintiff. *In either event the obligation of the company to pay the sum designated, and the right of the passenger to enforce the obligation in his own and the State's behalf,* are of purely statute creation. This, though made a topic of discussion, is quite too plain for argument; and it follows that no other process or procedure can be made use of to enforce a performance of the obligation than that which the statute itself prescribes." (Italics ours.) That rule obtains in both the federal and state courts and in England. 1 C. J. 989, § 102.

Bearing the foregoing propositions in mind, we have made a careful study of the entire statute. 45 USCA § 151 et seq. Without unduly extending this decision we have specially noted and call attention to section 152, subds. 1, 3, 4, and 5; section 153, subd. 1, pars. (c, e); section 154, subd. 1; section 155, subd. 1, pars. (a–c), and subds. 2, 3; section 157, subd. 3, par. (c); section 158, pars. (a, b, e, f, j–m); section 159, subds. 1–8.

The foregoing provisions at once impress on one's mind the fact that the Congress has imposed upon the employers and the employees many new obligations that did not exist before the enactment of the Railway Labor Act. At the same time it has provided for the creation of several tribunals and imposed on them the duties of assisting the parties in solving their problems. In addition it has provided for a resort to the courts for judicial approval of the award and to make the award enforceable as a judgment. But it has expressly provided that such resort must be to the federal courts and to only those federal courts named in the agreement to arbitrate. In view of the expressed provisions of the act and the particular subject-matter thereof, we think it must be presumed that the Congress did not intend to permit a resort to any court or tribunal not mentioned in the act. It follows that the ruling made by the trial court was correct.

In the trial court the defendants contended that the remedy of the plaintiff was to refer the controversy to the board of arbitration. Section 9, subd. 3(c) of the act (45 USCA § 159, subd. 3(c). In its brief the plaintiff has made an earnest effort to show that such contention may not be sustained. In view of the fact that this court has reached the conclusion that the state courts have no jurisdiction, it is neither necessary nor proper for it to express any opinion on the point.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

WESTERN UNION TELEGRAPH CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. *

Civ. 9550.

District Court of Appeal, First District, Division 2, California.

Nov. 26, 1934.

Rehearing Denied Dec. 26, 1934.

Hearing Granted by Supreme Court Jan. 24, 1935.

1. **Statutes** 🔑206

Every word in statute should be given force and effect.

2. **Statutes** 🔑194

When statute contains general provision and specific provision on same general subject, special provision governs special subject.

3. **Master and servant** 🔑385(16)

Under provision of Workmen's Compensation Act enumerating living expenses and medical expenses and when they may be allowed, medical expenses do not constitute "living expenses" (St. 1929, p. 323, § 24).

4. **Master and servant** 🔑385(17)

Where physician did not furnish employee with living expenses and was not employed by authorized agent of self-insured employer to render medical services to employee, physician did not have lien claim against employer for medical services rendered employee (St. 1929, p. 420, § 9, p. 323, § 24).

5. **Master and servant** 🔑385(17)

That employee who received medical services from physician not employed by self-insured employer thereafter received award of compensation did not entitle physician to lien claim against employer (St. 1929, p. 420, § 9; p. 323, § 24).

Petition by the Western Union Telegraph Company to review an order of the Industrial Accident Commission approving a lien in favor of Arthur Fibush, M. D., for medical treatment rendered Margaret Kassebaum, employee.

Order annulled.

Pillsbury, Madison & Sutro, of San Francisco (Francis Gill, of San Francisco, of counsel), for petitioner.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

J. Francis Shirley, of San Francisco, for respondent Fibush.

STURTEVANT, Justice.

The petitioner has applied to this court for a writ of review for the purpose of having annulled an order made by the Industrial Accident Commission determining the amount of and approving a purported lien in favor of the respondent Arthur Fibush.

On August 29, 1929, Margaret Kassebaum, while employed by the petitioner and in the course of her employment, was hit on the back of the neck by the dropping of a counter door. The petitioner is a self-insured employer. It paid to Miss Kassebaum the indemnity provided by law and furnished the medical treatment designated by law. Section 9, Workmen's Compensation, Insurance and Safety Act of 1917 (St. 1917, p. 836, as amended by St. 1929, p. 420). No claim is made that

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 48 P.2d 37.

it neglected to do so. No change of physicians was requested. The medical treatment was administered by Dr. Tracy Russell, who was one of the surgeons on the medical staff of the petitioner. He made his examination on September 4, 1929, and continued to treat her from that date until December 3, 1930, when the patient was discharged as cured. Later she was treated by Dr. Bill. The record does not disclose that he was a member of the medical staff of the petitioner. While being treated by him Miss Kassebaum consulted Dr. Fibush. He advised her and directed his assistant in administering some massage treatments. There is no claim that he furnished her clothes, lodging, or board. Before proceeding to treat Miss Kassebaum, Dr. Fibush testified that he telephoned Dr. Russell about her call and request for treatment and that Dr. Russell said: "All right, go ahead and give her your treatments." Pointing to that conversation the respondents assert that Dr. Fibush was employed by the petitioner. There is no evidence in the record that Dr. Russell had authority to employ, on the account of the petitioner, other doctors, nor that the petitioner directly employed Dr. Fibush. On the contrary, there is direct evidence that whenever the development of the case of any patient seemed to require a change in treatment the facts were communicated by Dr. Russell to the head office of the petitioner in New York and he received orders from that office as to what he should do. There is no claim that such course was followed, nor that the New York office was requested to make, nor that it made, any order in the premises.

On November 25, 1933, Miss Kassebaum applied to the Industrial Accident Commission for an award adjusting her compensation. After several hearings the claim was compromised. The agreement of compromise was signed October 4, 1933. Dr. Fibush filed with the commission a notice of lien on October 7, 1933. On that same day this petitioner received by mail a copy of the notice of lien. The commission approved the agreement of compromise on October 9, 1933. On October 24, 1933, the commission proceeded to conduct hearings on the lien. On April 10, 1934, it made an order as follows:

"Arthur Fibush, M. D., having on October 7, 1933, filed a request for a lien in the sum of $261.10, and the matter having been heard before Margaret McGuire, Referee, and submitted for decision, this Commission now makes the following Findings and Order:

"Findings of Fact.

"1. During the months of November and December, 1932, and January and February, 1933, Arthur Fibush, M. D., rendered certain medical treatment to the employee. Said treatment is a part of the living expenses incurred by the employee subsequent to her injury, and the lien is allowed in the sum of $178.50, in favor of Arthur Fibush, M. D. * * *"

[1-5] From the facts which we have recited we think it clearly appears that there was no evidence that Dr. Fibush at any time furnished any living expenses to Miss Kassebaum, and therefore the findings contained in the award dated April 10, 1934, were in excess of the jurisdiction of the respondent commission. There was no evidence that the petitioner or any of its authorized agents ever employed Dr. Fibush to render any medical services to Miss Kassebaum and, if medical services can under the statute be treated as living expenses, there was no evidence to support the award. But medical treatment cannot under the statute be said to be living expenses. It is a cardinal rule of statutory construction that every word in a statute should be given force and effect. It is another cardinal rule of construction that when the statute contains a general provision and a specific provision on the same general subject the special provision is the rule governing the special subject. Therefore, assuming for the purposes of this decision that under some circumstances some statutes as to living expenses may be treated as including medical treatment, we are not at liberty to so treat section 24 of the statute before us (St. 1917, p. 851, as amended by St. 1929, p. 323). It expressly enumerates living expenses and when they may be allowed, and it expressly enumerates medical treatment and when such expenses may be allowed. The lien claimant did not introduce evidence supporting a claim against the petitioner under either theory.

The briefs seem to imply that the commission entertained the opinion that although its order dated October 9, 1933, held that the petitioner was not liable to Dr. Fibush, nevertheless, if Miss Kassebaum received his services for any ailment suffered or contracted after the accident and later she was given an award by the commission then Dr. Fibush was entitled to file a lien. We do not so understand the law. The commission is not a general collection agency. Pacific Employers' Ins. Co. v. French, 212 Cal. 139, 298 P. 23. The lien claims for medical treatment of which it has jurisdiction are limited to those growing out of the treatment of the injury arising out of and in the course of the employee's employment, and no more.

For the reasons hereinabove set forth the order dated April 10, 1934, is annulled.

We concur: NOURSE, P. J.; SPENCE, J.

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2 Cal.App.2d 551

PEOPLE v. O'NEAL et al.

Cr. 1392.

District Court of Appeal, Third District, California.

Dec. 3, 1934.

Hearing Denied by Supreme Court Dec. 28, 1934.

1. Robbery 🔑24(1)

Evidence showed that taxicab was feloniously taken from driver's possession by threat to use knife, constituting necessary exercise of force for robbery and warranting implied finding of existence of fear on part of owner (Pen. Code, § 211).

2. Robbery 🔑17(7)

Information *held* to charge robbery notwithstanding failure to allege that automobile was seized by use of knife or that accused was then armed with deadly weapon (Pen. Code, § 211).

3. Robbery 🔑28

Verdict in robbery prosecution need not name weapon used nor find that instrument is in fact deadly weapon, but it is sufficient if it finds that accused is guilty of robbery either of first or second degree (Pen. Code, §§ 211, 1157).

4. Criminal law 🔑1202(3)

Evidence, in robbery prosecution, that accused held open pocketknife against taxicab driver's stomach threatening to stab him, supported finding, preceding sentence to life imprisonment as habitual criminal, that accused was armed with "deadly weapon," though record failed to show length of knife blade (Pen. Code, § 1168).

[Ed. Note.—For other definitions of "Deadly Weapon," see Words & Phrases.]

5. Criminal law 🔑1202(1)

Whether knife used by accused was sufficiently large to constitute deadly weapon *held* immaterial as regards propriety of life sentence, where accused was convicted of robbery together with three other prior felony convictions, requiring life sentence whether accused was guilty of robbery of first or second degree and whether or not he was armed with weapon (Pen. Code, §§ 644, 1168).

6. Robbery 🔑24(1)

Evidence in robbery prosecution, where accused held open pocketknife against victim's stomach, sustained jury's implied finding that accused was armed with "dangerous or deadly weapon" within definition of robbery of first degree (Pen. Code, § 211a).

[Ed. Note.—For other definitions of "Dangerous Weapon," see Words & Phrases.]

7. Robbery 🔑11

Open pocketknife held against victim's stomach with threat to stab him might constitute "deadly weapon" within definition of robbery of first degree, even though blade was less than five inches long; requirement of such minimum being confined exclusively to statute for purpose of determining minimum penalty for felony (Pen. Code, §§ 211a, 1168).

8. Robbery 🔑11

"Dangerous or deadly weapon," within definition of robbery of first degree, is any weapon or instrument which from manner that it is used or attempted to be used, is likely to produce death or great bodily injury (Pen. Code, § 211a).

9. Criminal law 🔑730(13)

In prosecution for robbery of taxicab, district attorney's opening statement that defendant previously demanded use of State Highway Division automobile and hit watchman over head with iron bar when he refused, *held* not reversible error in view of instruction that statement was not to be considered as evidence and subsequent instruction that verdict must be based solely upon evidence and that all statements of counsel were to be disregarded (Pen. Code, § 211).

10. Criminal law 🔑1202(3)

In robbery prosecution, evidence *held* sufficient to identify accused as individual convicted of murder of second degree in another state under another name, as alleged.

11. Criminal law 🔑1202(3)

Duly authenticated and proved certified copy of commitment is competent to establish prior conviction.

12. Automobiles 🔑357

Instruction that if defendants did not take automobile with intention of stealing it, but only for temporary use without owner's consent, jury must acquit defendants of robbery, but that they might be found guilty of lesser offense prohibited by Penal Code, *held* properly refused, since robbery does not include as lesser offense misdemeanor of taking vehicle for temporary use without owner's permission (Pen. Code, §§ 211, 499b).

13. Robbery 🔑27(5)
Instruction that if defendants did not take automobile with intention of stealing it, but only for temporary use without owner's consent, jury must acquit defendants of robbery, but that they might be found guilty of misdemeanor, *held* properly refused as misleading in failing to inform jury that they might find defendants guilty of misdemeanor only in absence of satisfactory evidence that they were guilty of robbery (Pen. Code, §§ 211, 499b).

14. Criminal law 🔑1173(2)
Failure to instruct that if defendants did not take automobile with intention of stealing it, but only for temporary use without owner's consent, jury must acquit defendants of robbery, but that they might be found guilty of misdemeanor, *held* not reversible error, where evidence was convincing that defendants appropriated automobile by force with intention of permanently depriving owner of his property (Pen. Code, §§ 211, 499b).

15. Witnesses 🔑337(5)
In robbery prosecution, cross-examination whether defendant had not been previously convicted of other felonies, though he had admitted two prior convictions and denied third, *held* proper, where defendant testified in his own behalf (Pen. Code, § 1025).

16. Robbery 🔑24(1)
In prosecution of man and woman for robbery of taxicab, evidence that man requested woman in back seat to take gun out of grip and keep driver covered, and that she replied that she had driver covered with weapon, *held* sufficient to show that woman was present, aided, abetted, and encouraged commission of offense, rendering her guilty as principal (Pen. Code, §§ 31, 211).

17. Criminal law 🔑1175
Woman could not complain that her conviction of robbery of second degree was inconsistent with conviction of her male associate of robbery of first degree (Pen. Code, §§ 211, 1404).

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

James B. O'Neal was convicted of robbery of the first degree and sentenced to life imprisonment as an habitual criminal, and Mae Stockdale was convicted of robbery in the second degree, and they appeal separately.

Affirmed.

James B. O'Neal and Paul E. Gehres, of Stockton, for appellant O'Neal.

O. C. Parkinson, of Stockton, for appellant Stockdale.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendants were jointly charged under the provisions of section 211 of the Penal Code with the crime of robbery committed by feloniously taking an automobile from the possession of the owner thereof by the exercise of force. In the same information O'Neal was charged with three prior convictions of other felonies. Each defendant pleaded not guilty of the present charge of robbery. O'Neal admitted two of the charges of prior convictions of felonies. He denied that he was previously convicted in Montana on a charge of murder of the second degree. The defendants were jointly tried with a jury. Separate verdicts were returned finding O'Neal guilty of robbery of the first degree, and that he had suffered a prior conviction of murder of the second degree in Montana as alleged in the information. Mae Stockdale was found guilty of robbery of the second degree. Separate judgments of commitment were rendered against the defendants. From these judgments and the orders the defendants have perfected separate appeals. These appeals are brought to this court in a single record.

In pronouncing sentence the court determined from the evidence which was adduced at the trial that O'Neal was armed with a deadly weapon at the time of the commission of the present charge of robbery; that he also suffered the three prior convictions of felonies with which he was charged, for each of which he had served separate terms of imprisonment. Thereupon the court adjudged O'Neal to be an habitual criminal under the provisions of section 644 of the Penal Code, and sentenced him to imprisonment for life in the state prison at Folsom. His application for parole was denied. The appeal of the defendant O'Neal will be first considered.

The evidence is ample to support the verdict and judgment of conviction of James O'Neal of robbery of the first degree including the necessary element of intent on the part of the defendants to feloniously take the automobile by the exercise of force and fear. The intention with which an act is performed may be manifested by the circumstances of the case. Section 21, Pen. Code.

[1] The defendants procured Carl Morlath of Sacramento to take them in his taxicab to Stockton. O'Neal sat with the owner of the car in the front seat. Mae Stockdale sat in the rear seat. Immediately after they left Sacramento, O'Neal took out a pocketknife and placing it against Morlath's stomach ordered him to drive down the highway until they reached Elk Grove, where they stopped for gasoline. While they were at the gas station O'Neal kept his knife ready for action. Mr. Morlath testified that when they left the gas station, O'Neal told Mae Stockdale "to take the gun out of the grip and keep me covered." He said: "Mrs. Stockdale was in the back seat and she said she had me covered and I was afraid to look around in the back seat and I kept on going." When they reached Manteca they drove on to a side road, and O'Neal said "drive off the main road and park. * * * I need the car to make a get-away. * * * I am going to take the car, you get out and walk." Morlath was forced out of the car, and the defendants drove away. The owner of the machine hailed a passing automobile and rode in that car until they overtook a highway patrol officer. He then accompanied that officer until they overtook and captured the defendants who were then arrested and taken in custody. The knife was taken from the possession of O'Neal, but no revolver was found. The evidence shows that the automobile was feloniously taken from the possession of Morlath by means of the threat to use a knife, which constitutes the necessary exercise of force and warrants the implied finding of the existence of fear on the part of the owner of the car. The circumstances clearly indicate an intention on the part of the defendants to steal the machine contrary to the provisions of section 211 of the Penal Code.

[2] The information sufficiently charges the defendants with the crime of robbery in substantially the language of section 211 of the Penal Code. It was not necessary to designate the specific means by which the alleged force or fear was accomplished. Nor was it necessary to charge that the automobile was seized by means of the use of a knife or that O'Neal was then armed with a deadly weapon. People v. Covington (Cal. Sup.) 34 P.(2d) 1019; People v. Tognola, 83 Cal. App. 34, 256 P. 455; People v. Hayes, 118 Cal. App. 341, 5 P.(2d) 439; In re Colford, 68 Cal. App. 308, 229 P. 63; sections 950–952, Pen. Code.

Nor does the form in which the information was filed violate the Fourteenth Amendment to the Constitution of the United States which declares that no person shall be deprived of his liberty without due process of law. People v. Covington (Cal. Sup.) 34 P. (2d) 1019.

[3] It is not necessary in a charge of robbery for the verdict to name the weapon, if any, which is used in the commission of the offense, nor is it necessary for the jury to find in the verdict that the instrument, if one is used in the perpetration of the crime, is in fact a deadly weapon. People v. Tognola, 83 Cal. App. 34, 256 P. 455. The verdict is sufficient if it finds that the accused is guilty of either robbery of the first degree or robbery of the second degree. Section 1157, Pen. Code; 8 Cal. Jur. 406, § 435.

[4, 5] The record supports the court's finding that the defendant O'Neal was armed with a deadly weapon at the time of the commission of the crime. It appears that O'Neal held an open pocketknife against the stomach of Morlath threatening to stab him if he did not obey his commands. The knife was received in evidence, and the court had the opportunity to examine it. The record fails to show the length of its blade. Under such circumstances we must assume that an inspection of the weapon shows that it had a blade over five inches in length, and that it fulfills the definition of a knife used as a "deadly weapon," for the purpose of pronouncing sentence under the provisions of section 1168 of the Penal Code. Moreover, it is immaterial, under the circumstances of this case, whether the knife fulfills the requirements of section 1168 of the Penal Code, or not, with respect to the character of that weapon, for the reason that the defendant was convicted of robbery together with three other prior convictions of felonies, which required the court to sentence him, under the provisions of section 644 of the Penal Code, to imprisonment for life without the privilege of parole, regardless of whether he is guilty of robbery of the first or the second degree, and independently of whether he was armed with a weapon at the time of the commission of the offense. But there is ample evidence that O'Neal used an open pocketknife in perpetrating the crime of robbery.

[6-8] The evidence sustains the implied finding of the jury that O'Neal was "armed with a dangerous or deadly weapon," as that term is used in section 211a of the Penal Code in defining robbery of the first degree. Peo-

ple v. Seaman, 101 Cal. App. 302, 281 P. 660. An open pocketknife held at the stomach of an assailed person with a threat to stab him may constitute a deadly weapon even though the blade of the knife is less than five inches in length. People v. Caberera, 104 Cal. App. 414, 286 P. 176. A dangerous or deadly weapon has been frequently described in our authorities as any weapon or instrument which, from the manner that it is used or attempted to be used, is likely to produce death or cause great bodily injury. The jury was so instructed in this case. The term "deadly weapon" as it is employed in section 1168 of the Penal Code, which includes "any knife having a blade longer than five inches," is confined exclusively to the application of that section for the purpose of determining the minimum penalty for the commission of a felony. People v. Caberera, supra.

The appellant O'Neal is mistaken in asserting that the court was guilty of prejudicial error in permitting the clerk to call the attention of the jury to the fact that he had suffered conviction of two prior charges of other felonies to which he had pleaded guilty. The record shows that in reading the information to the jury the clerk merely read the main charge and the one charge of a prior conviction of murder of the second degree committed in Montana, to which he had pleaded not guilty. The other two charges of prior convictions were omitted by the clerk in that procedure. This was in exact accordance with the procedure in that regard which is required by the provisions of section 1025 and 1093 of the Penal Code.

[9] The district attorney is charged with prejudicial misconduct in asserting in his opening statement to the jury that he expected to prove that immediately before the defendant O'Neal procured the taxicab which he is charged with stealing, he visited the maintenance yard of the state highway division in Sacramento and demanded the use of a car from Mr. Schaffer, the watchman, who refused to deliver it to him, saying that those machines belonged to the state and could not be rented or used by others, and that O'Neal then "seized an iron bar and hit this man Schaffer over the head, inflicting a severe injury." Upon objection to this statement, the court instructed the jury to disregard it, saying: "The statements of counsel constitute no evidence * * * and the jury is so instructed." We are satisfied the preceding statement of the district attorney does not constitute reversible error under the circumstances of this case, since the court instructed the jury that it was not to be considered as evidence, and they were subsequently instructed that their verdict must be based solely upon the evidence adduced at the trial, and that all statements of counsel are to be disregarded. People v. Garcia, 83 Cal. App. 463, 469, 256 P. 876; People v. Davis, 26 Cal. App. 647, 147 P. 1184; People v. Sing Yow, 145 Cal. 1, 78 P. 235; People v. Pantages, 212 Cal. 237, 244, 297 P. 890; People v. Wolcott, 137 Cal. App. 355, 365, 30 P.(2d) 601.

[10, 11] The evidence is sufficient to identify O'Neal as the individual who was convicted of murder of the second degree in Montana under the name of Harvey Whitton as charged in the information. The duly authenticated copy of the commitment of Harvey Whitton to the Montana state prison at Deer Lodge, March 31, 1898, was received in evidence. It contained a photograph and minute description of that prisoner, including his height, weight, complexion, color of hair and eyes and the following identifying marks: "Dim scar on first finger of left hand. Dim scar on left shin below the knee. * * *" Charles Stone, an assistant officer in the state bureau of identification at Sacramento, testified that he knew the defendant O'Neal and had a conversation with him subsequent to May, 1933, in the identification bureau at Sacramento, in which he admitted to Mr. Stone that he had served a sentence in the Montana state prison at Deer Lodge under the name of Harvey Whitton. Warren Boalt, superintendent of the bureau of identification of San Joaquin county, testified that he knew the defendant O'Neal and upon examination of his body just prior to the trial of this case, he found "a scar on his left shin," and a "dim scar on the left index finger," conforming to the identifying marks which were certified to exist on the person of Harvey Whitton. The photograph which is attached to the Montana commitment is not before this court. It was submitted to the jury in the trial of the case, and we must assume that it appeared to be the likeness of the defendant O'Neal. His identity as the same person who served time for the prior conviction of murder of the second degree in the state prison of Montana under the name of Harvey Whitton is sufficiently established. The certified copy of the commitment was duly authenticated and proved and it is competent evidence with which to establish the prior conviction of the defendant as alleged in the information. People v. Wilson, 103 Cal. App. 420, 284 P. 988; People v. Howard, 72 Cal. App. 561, 237 P. 780.

[12] The court did not err in refusing to give to the jury defendants' proposed instruc-

tion No. 6, which stated that if the jury found that the defendants did not take the automobile with the intention of stealing it, but took it only for temporary use without the owner's consent, it was the duty of the jury to acquit the defendants of robbery, but that, under such circumstances, they might be found guilty of the lesser offense prohibited by section 499b of the Penal Code. The jury was clearly instructed that they could not convict the defendants unless they found that the automobile was taken by means of force or fear from the possession of the owner with intent to permanently deprive him of his property. One instruction in that regard reads in part: "To constitute robbery therefore there must be an intent to steal, or permanently to deprive the prosecuting witness of his property in addition to the use of force or fear in the taking."

We are of the opinion that the crime of robbery does not include as a lesser offense contained therein the misdemeanor of taking a vehicle for temporary use without the permission of the owner, contrary to the provisions of section 499b of the Penal Code. The character of these offenses is entirely different. They do not contain the same elements. Robbery contemplates the stealing of property from the possession of the owner by means of violence, force, or fear, with the intention of permanently depriving the owner of his property. The misdemeanor merely prohibits the taking of a vehicle for temporary use without the permission of the owner.

[13, 14] Moreover, the rejected instruction is defective and misleading. It fails to inform the jury that they might find the defendants guilty of a violation of section 499b only in the absence of satisfactory evidence that they were guilty of robbery. The proposed instruction merely states that if the jury finds from the evidence that the defendants had no intention of *stealing* the machine, they might find them guilty of the lesser offense. They were not charged with larceny of the car. The proposed instruction omitted any reference to the necessary elements of force or fear in the taking of the automobile. It was therefore properly refused. But assuming, without so deciding, that the instruction should have been given, its refusal does not constitute reversible error for the reason that there was no miscarriage of justice in finding the defendants guilty of robbery. The evidence is very convincing that they appropriated the car by means of force, with the intention of permanently depriving the owner of his property.

[15] It was not prejudicial error, nor a violation of the provisions of section 1025 of the Penal Code, to permit the prosecution to ask the defendant if he had not been previously convicted of other felonies, notwithstanding the fact that he had admitted two prior convictions with which he had been charged and denied a third charge of prior conviction. The defendant took the witness stand in his own behalf and testified to alleged facts in absolute conflict with the evidence adduced by the prosecution. By doing so he waived the provisions of section 1025 of the Penal Code. The prosecution had a perfect right to ask him on cross-examination if he had not been previously convicted of these other felonies for the legitimate purpose of impeachment. People v. Fontes, 110 Cal. App. 141, 293 P. 835; People v. King, 77 Cal. App. 434, 246 P. 822.

There is no merit in the other contentions of the appellant O'Neal.

In the separate appeal of the defendant Mae Stockdale she contends that the verdict finding her guilty of robbery of the second degree is not supported by the evidence for the reason that there is an absence of any showing that the defendants intended to permanently deprive the owner of his automobile, and that the separate verdicts which were returned against the defendants are inconsistent.

[16] There is no merit in either of these contentions. For the reasons heretofore assigned with relation to the appeal of James O'Neal, the evidence is sufficient to show that the defendants took the car intending to steal it, by means of a threat to stab the owner with a pocketknife and because they created fear on the part of the owner that Mae Stockdale might shoot him from her position in the back seat, if he failed to obey their orders. There is evidence that in response to O'Neal's request for her "to take the gun out of the grip and keep me covered," she replied that she had Morlath covered with the weapon. The evidence is sufficient to show that Mae Stockdale, being present, aided, abetted and encouraged the commission of the offense, which renders her guilty as a principal. Section 31, Pen. Code.

[17] Since the evidence is ample to have sustained a conviction of the defendant Stockdale of the crime of robbery of the first degree, she may not complain that she was found guilty of the lesser offense of robbery of the second degree. The verdict was not prejudicial to the appellant Stockdale on that

account. It may be said to be too favorable to her. There is no merit in her contention that the verdict should be set aside and the cause reversed as to her because it is inconsistent with the verdict of the higher degree of robbery which was returned against her associate in the perpetration of the crime. People v. Muhlner, 115 Cal. 303, 47 P. 128; People v. Hudson, 92 Cal. App. 593, 268 P. 687; section 1404, Pen. Code; 8 Cal. Jur. 420, § 445.

The judgments and the orders against both appellants are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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2 Cal.App.2d 637

RATH v. INDEMNITY INS. CO. OF NORTH AMERICA.

Civ. 8741.

District Court of Appeal, Second District, Division 2, California.
Dec. 6, 1934.

1. Evidence 🔑518

In action on bond to indemnify broker against dishonesty of employees, but not covering trading loss, admission of expert testimony as to whether acts described constituted trading loss *held* error; this being question for court's determination.

2. Insurance 🔑430

In action on bond to indemnify broker against dishonesty of employees, but not covering trading loss, loss due to employee's entry of order for certain customer without such customer's consent *held* to have occurred in "trading" transaction.

[Ed. Note.—For other definitions of "Trading," see Words & Phrases.]

3. Insurance 🔑430

Clause in bond to indemnify broker against dishonesty of employees that it should not cover any loss from trading *held* to limit dishonesty clause and relieve surety from liability for any dishonest act of employee committed in trading transaction resulting in loss.

◆

Appeal from Superior Court, Los Angeles County; Joseph L. Call, Judge.

Action by Howard G. Rath, doing business under the firm name and style of the Howard G. Rath Company, against the Indemnity Insurance Company of North America. Judgment for plaintiff, and defendant appeals.

Reversed.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for appellant.

James P. Mackel and William M. Rains, both of Los Angeles, for respondent.

WILLIS, Justice pro tem.

Judgment on findings and conclusions was entered in the court below against appellant for $2,134.26 and interest, upon a "broker's blanket bond" issued by appellant to respondent to indemnify him against any losses suffered through certain prescribed acts of his employees while he was engaged in the brokerage business in Los Angeles. The bond provided indemnity for loss sustained by the insured (a) through any dishonest act of any of the employees whenever committed and whether committed directly or by collusion with others, and (b) through larceny, whether common law or statutory, robbery, burglary, holdup, theft, or other fraudulent means. It further provided that "this bond does not cover any loss directly, or indirectly from trading, actual or fictitious, whether in the name of the insured or otherwise, and whether or not within the knowledge of the insured, and notwithstanding any act or omission on the part of any employee in connection therewith, or with any account recording the same."

One Lee R. Crittenden was, after April 21, 1930, a customer of respondent; he having on that date signed one of respondent's regular margin cards. In respondent's employ at the times herein mentioned was one Shepard, as a margin clerk, and one Tomberlin, as messenger boy; also one James was employed as an order clerk, whose duties consisted in communicating from respondent's office to New York or other markets all orders for the purchase and sale of securities. On June 13, 1930, there was given to James an order, purporting to be signed by Crittenden and approved "by Salesman G. M. Tomberlin," to buy certain stock. James inquired of Shepard whether Crittenden had sufficient margin to cover such order, to which Shepard replied that the margin was "O. K." James thereupon executed the order with the respondent's correspondent on the New York Exchange, and the purchase price of the stock was charged by the correspondent company against respondent's account. On June 16, 1930, a similar transaction was accomplished in the same manner and with similar result, creating a debit in the New York house against respondent in the total sum of $7,285. Both these transactions were without Crittenden's knowledge or authority, which fact was not discovered by respondent until July 8, 1930, whereupon respondent at once took possession of the stock so purchased by transferring it from the Crittenden account to his own. On that date this stock was of the value of only $5,200, a decrease of $2,175 from the purchase price, for which amount, less $40.74 of salary due Shepard or Tomberlin, which respondent retained and credited on the loss, or $2,134.26, respondent seeks to hold appellant liable under the bond in question. After trial, the court found in effect that the acts of respondent's employee were wrongful, fraudulent, and dishonest, that the employee had appropriated to his own use certain funds belonging to respondent on deposit with the New York correspondent, and that by reason of such dishonest acts respondent had suffered damage in the sum of $2,134.26, with interest thereon. The court further found that respondent was not engaged in trading according to the general acceptance of said term in the transactions in question, and that the loss suffered was not a trading loss so as to bring it within the exonerating clause of the bond, but that the loss was the result of the wrongful, fraudulent, and dishonest act of the employee of respondent. The conclusion of the court was that the loss was the result of dishonest acts of the employee, and that respondent was entitled to judgment for the amount thereof.

At the trial, over appellant's objection, the court permitted an "expert witness" to answer a hypothetical question comprising a statement of all the substance of the testimony and other evidence making up the transactions in question, and concluding with: "Have you an opinion as to whether or not loss sustained in the amount specified resulted from trading, either actual or fictitious?" To such question the witness answered: "I don't think it was a trading loss." On cross-examination he testified that trading was any purchase or sale of securities.

On this appeal it is contended that the court erred in admitting this expert testimony, that the findings as recited above are not supported by the evidence, and that the conclusions of law and judgment are not warranted by the findings or evidence. In all these contentions we agree with appellant.

[1, 2] The court erred in overruling the objection to the admission of expert testimony as to whether the acts described constituted trading and as to whether the loss suffered therefrom was a trading loss. That was a question for the determination of the court, which, under the circumstances, was competent to attach to the word its ordinary and common meaning; there being no question raised as to its having any peculiar or limited meaning as employed in the text of the bond. That the loss suffered occurred in a trading transaction is obvious, in the light of the common and well-known meaning of the term "trading," when used in connection with the purchase and sale of securities.

[3] Under the terms of the exonerating provision of the bond, it is immaterial whether the loss in a trading transaction was occasioned by the dishonest act of an employee or not. The very language and its place in the contract carry conviction that the exonerating clause limited the dishonesty clause, and has the effect of relieving the surety from liability for any dishonest act of an employee committed in a trading transaction resulting in loss.

Our conclusions thus expressed are in harmony with, and fully sustained by the decision in the case of Earl v. Fidelity & Deposit Co., 138 Cal. App. 435, 32 P.(2d) 409, decided in May, 1934, and in which a hearing has been denied by the Supreme Court. That case is so similar in all its aspects to this that we refrained herein from extensive discussion, being satisfied to state our reasons for this decision briefly, and referring to the above case as authority and for detail of discussion and conclusions on legal phases.

It follows, therefore, that the findings complained of are not supported by the evidence, and that the conclusions and the judgment are not supported by the findings or by the evidence.

The judgment is reversed.

We concur: STEPHENS, P. J.; CRAIL, J.

2 Cal.App.2d 702

EVANS v. MITCHELL et al.

Civ. 9160.

District Court of Appeal, First District,
Division 1, California.
Dec. 10, 1934.

1. Automobiles 🔑245(44)

In action for injuries received in automobile collision at intersection, whether speed of defendant's automobile was excessive *held* for jury.

2. Evidence 🔑471(17)

Witness *held* competent to testify that impact of colliding automobiles pushed one automobile around and against hedge, as against contention that testimony was a conclusion of witness.

3. Appeal and error 🔑1064(1)

Instruction that, if driver's negligence were proven, it was no excuse that he did not know of presence of another automobile on street or that it was not seen by him in time to avert collision, and that it was duty of driver, when his view was unobstructed, to see automobiles in front of his machine, *held* not prejudicial error, though driver's view was obstructed.

4. Automobiles 🔑246(2)

Instruction that persons using streets must use constant care, that driver of automobile must exercise reasonable care in proportion to danger as shown by circumstances, and that he must be on watch for other vehicles, which is a continuing duty and must be exercised in reasonably careful manner, *held* not erroneous because requiring driver to exercise more than ordinary care.

5. Trial 🔑296(11)

Instruction relative to damages if defendant's negligence proximately caused "collision" between automobiles *held* not misleading because negligence must have proximately caused plaintiff's "injury," where correct rule was stated in other instructions.

6. Trial 🔑296(3)

Instruction relative to negligence for failure to have automobile properly equipped *held* not reversible error because there was no evidence that defendants' automobile was not properly equipped, where jury were further instructed that they must determine whether such negligence, if any, proximately caused plaintiff's injury.

7. Appeal and error 🔑1066

Instruction must be applicable to evidence, and, if not, it is ground for reversal if it is calculated to mislead.

8. Appeal and error 🔑1066

Error in giving instruction inapplicable to evidence is not ground for reversal, where evidence on other issues is sufficient to sustain verdict.

9. Negligence 🔑93(1)

Contributory negligence of host who was driving automobile when collision occurred was not imputable to injured guest who exercised no control over host.

10. Automobiles 🔑244(37)

Evidence *held* to sustain finding that driver's excessive speed when automobile entered obstructed intersection where collision occurred was negligence which proximately caused injury to guest in other automobile.

◆

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Nellie Evans against Allen George Mitchell and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Frank V. Campbell and L. H. Schellbach, both of San Jose (Garton D. Keyston, of San Francisco, of counsel), for appellants.

J. Francis Shirley, of San Francisco, Lloyd C. White, of Salinas, and Irvin A. Frasse, of San Jose, for respondent.

PER CURIAM.

An appeal by defendants from the judgment entered against them in an action for damages for personal injuries.

Plaintiff was injured while riding as a guest passenger in a Ford automobile which was being driven south along Cowper street in Palo Alto. At the intersection of this street with Coleridge street a collision occurred with a Cadillac automobile which was being driven westerly along the last-named street by Allen G. Mitchell. The latter was a minor, whose application for an operator's license was signed by Idelle Mitchell, his mother. Plaintiff alleged that her injuries were due to defendant driver's negligence. The defendants contend that the evidence shows that the sole proximate cause thereof was the negligence of the driver of the Ford car, and that the trial court erred in its instructions to the jury and in certain of its rulings.

It appears from the testimony that, in approaching the intersection from the east, the view to the north was obstructed by several trees and a hedge on the northeast corner of the intersection. The driver of the Ford car testified that she entered the intersection at a speed of fifteen miles an hour, and that she looked to the east as she entered, but did not observe the Cadillac car until she had passed the center of Coleridge street, when her car was struck on the left rear side. It appears that the impact turned the Ford car almost completely around and forced it upon the sidewalk. The testimony was conflicting as to the speed of the vehicles and their positions relative to the intersection immediately before the collision. It was testified that the Cadillac was stopped within a few feet of the point of impact and did not pass out of the intersection, and also that the Ford continued to travel for a distance of some forty feet.

[1] It is claimed that this testimony renders untenable the contention that the speed of the Cadillac car was excessive. While such was the tendency of this evidence, it was not conclusive, as the weight to be given the testimony of the witnesses—some of whom were related to or were friends of the defendants—was a question for the jury.

[2] A witness was permitted to testify that the impact of the Cadillac against the Ford pushed the latter car around and against a hedge. It is claimed that the answer was but the opinion of the witness and should have been stricken out. There is no merit in this contention.

[3] The jury was instructed that, if his negligence were proven, it would be no excuse for the defendant to say that he did not know of the presence of another automobile on the street, or that it was not seen by him in time to avert a collision; further, that it is the duty of a driver when his view is unobstructed to see automobiles on the road in front of his machine. We find no prejudicial error in this instruction. If the jury believed that the defendant's speed when entering the obstructed intersection was excessive, this would be sufficient to prove negligence, and the fact that he did not know of plaintiff's presence would not excuse him. 1928 Cal. Jur. Supplement, Automobiles, § 65, p. 142; Soda v. Marriott, 118 Cal. App. 635, 5 P.(2d) 675. While here the view was obstructed, and the latter portion of the instruction was inapplicable to the facts, it was not for this reason necessarily prejudicial, and it cannot reasonably be said that it was so in the present case.

[4] The court also charged that all persons using the streets must use constant care and caution, and that in driving an automobile one must exercise reasonable care and caution in proportion to the danger as shown by the circumstances in each case; further that a driver must be on the watch for other vehicles traversing the highway, that this is a continuing duty and must be exercised in a reasonably careful and cautious manner at all times. Defendants claim that this instruction requires more than ordinary care, but we cannot agree with this contention. A driver must exercise constant care (Donat v. Dillon, 192 Cal. 426, 221 P. 193); and it is likewise a continuing duty that he be on the watch for other drivers (Minor v. Foote, 100 Cal. App. 441, 280 P. 197; Berlin v. Violett, 129 Cal. App. 337, 18 P.(2d) 737), and the instruction requires no more than that he exercise reasonable care in those respects.

[5] Complaint is also made of an instruction that, if defendant was found guilty of negligence which proximately caused or contributed to the collision, it was for the jury to determine what pecuniary liability should be imposed, provided they found that plaintiff was free from contributory negligence.

As urged by defendants the negligence complained of must proximately cause injury to the plaintiff; but here under the facts, if the defendants' negligence proximately caused or contributed to the collision, it necessarily followed that the same negligence was a proximate cause of plaintiff's injury; moreover, the correct rule was clearly stated in other instructions, and it is not reasonable to assume that the jury was misled.

[6] The court also charged that every motor vehicle when operated on the public highway must be equipped with a horn capable of emitting sounds audible under normal conditions at a distance of not less than 200 feet, and that a violation of any provisions of the California Vehicle Act, except provisions regarding the speed of vehicles, constituted negligence, but that the question whether such negligence, if any, proximately caused or contributed to plaintiff's injury, was for the jury to determine from the evidence.

[7, 8] As urged by defendants, there was no evidence that their car was not properly equipped, and the instruction to that extent was erroneous. It is the rule that an instruction must be applicable to the evidence, and where this is not the fact it is ground for reversal if it is calculated to mislead. 24 Cal. Jur., Trial, § 95, p. 830. But here the jury was also told that it was for them to determine from the evidence whether there was negligence with respect to the equipment, and we are of the opinion that they must have so understood it. Moreover, an error of this

character is not ground for reversal where the evidence on other issues is sufficient to sustain the verdict. Eppinger v. Kendrick, 114 Cal. 620, 46 P. 613; Bosqui v. Sutro R. Co., 131 Cal. 390, 401, 63 P. 682; Mundorff v. Ramm, 66 Cal. App. 553, 569, 226 P. 820; Brandes v. Rucker-Fuller Desk Co., 102 Cal. App. 221, 282 P. 1009.

[9] It is not contended that plaintiff was in any degree negligent, or exercised any control over the driver of the car; consequently, the negligence of the latter, if any, was not imputable to her. Marchetti v. Southern Pacific Co., 204 Cal. 679, 269 P. 529. If the defendant driver was guilty of negligence which was the proximate cause of plaintiff's damage, the fact that the driver of the Ford car was guilty of contributory negligence would not bar recovery. Kelley v. Hodge Transportation System, 197 Cal. 598, 242 P. 76.

[10] The physical circumstances of the accident, together with the testimony of the witnesses, support the conclusion of the jury that defendant driver was negligent, and that his negligence was a proximate cause of the damage, and the record discloses no error which would warrant a reversal.

The judgment is affirmed.

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2 Cal.App.2d 435

WADE v. HOWE et al.

Civ. 5129.

District Court of Appeal, Third District, California.

Nov. 26, 1934.

1. Ejectment 🔑69

In ejectment, defendants relying on their claim of equitable title adverse to, and not disclosed in, chain of legal title, must affirmatively allege in answer the particular facts on which they depend.

2. Ejectment 🔑84(5)

Evidence of an affirmative equitable defense to an action in ejectment, in conflict with clear legal title to the land, is incompetent, in absence of specific allegations of particular facts on which defendant relies (Code Civ. Proc. § 437).

3. Ejectment 🔑84(5)

Grantee of land under quitclaim deed from heirs of original owner *held* entitled to maintain ejectment against tenants of subgrantee, where deed to subgrantee's grantor specifically excepted disputed property, and instrument, upon which tenants based equitable title, was not specifically alleged in answer.

◆

Appeal from Superior Court, Del Norte County; Harry W. Falk, Judge.

Suit by Dee H. Wade against Warren A. Howe and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Geo. W. Howe, of Crescent City, for appellants.

Hersch & Peterson, of Crescent City, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendants have appealed from a judgment which was rendered against them in a suit in ejectment. The cause was tried on a written stipulation of facts.

This suit involves the right of possession to block 91 of the city of Crescent City. Both parties claim that right, based upon a common source of title from the heirs of George M. Keller, deceased. The plaintiff holds a quitclaim deed from all of the heirs of George M. Keller, dated April 5, 1930, and duly recorded. The defendants claim the right of possession as tenants of Otmar Bauer. After demanding possession of the property from the defendants, the plaintiff brought this action in ejectment alleging that he is the owner and entitled to the possession of block 91 in Crescent City. The defendants merely denied the allegations of the complaint without affirmatively pleading any facts upon which they claim that the predecessors in title of their landlord intended to convey to Otmar Bauer block 91 of Crescent City, but that by mistake it was omitted from the deeds.

The stipulated facts show that all of the heirs of George M. Keller, deceased, joined in a deed of conveyance to J. F. Reddy, January 15, 1927, of a part of section 29, township 16 north, range 1 west, of Humboldt meridian in Crescent City, specifically excepting therefrom block 91. This deed was recorded at 2 o'clock p. m. on March 10, 1927. On the last-mentioned date J. F. Reddy deeded to Otmar

Bauer "approximately the same property which was deeded to him by the Keller heirs." January 11, 1927, Reddy and wife conveyed to Otmar Bauer a portion of the same Crescent City tract of land. This last-mentioned deed originally included in the description of the property sought to be conveyed block 91. It is stipulated that "no conveyance * * * appears in the records by which Block 91 was ever specifically conveyed to Reddy." So far as the record is concerned, block 91 never was conveyed from the Keller heirs to Reddy. He never held title to that block of land. It appears that the deed which was recorded March 10, 1927, from Reddy and wife to Otmar Bauer did at first contain in the description of the property sought to be conveyed thereby block 91, although that block never had passed to Reddy by deed from any source. The county clerk testified that at the request of James McNulty, an attorney, he changed the description in the last-mentioned deed, after it was recorded, by eliminating therefrom block 91. He said that block 91 was erroneously included in the deed to Otmar Bauer. That irregular transaction is immaterial. While the defendants claim the right to possession of this property as the tenants of Otmar Bauer, there is no evidence of any lease, verbal or written, from Bauer to the defendants. The only instrument upon which the defendants rely for their equitable claim of title in their asserted landlord Bauer is a written contract, dated March 8, 1927, in which but two of the five Keller heirs and Mr. and Mrs. Reddy agree to sell to Otmar Bauer "the unsold portions of the fractional Northwest Quarter of Section 29, T. 16 N., R. 1 W., H. M." This contract may have been abandoned or canceled. There is no reference to this agreement in the stipulated facts which control the determination of this appeal. It does appear in the transcript, and is referred to in the briefs. There is no evidence that the Keller heirs ever did attempt to convey block 91 to any one except the plaintiff. Finally, the stipulation of facts recites that "other documents on file with the clerk as exhibits are mentioned by the defendants as tending to show an intention upon the part of the Keller heirs to convey said Block 91 to Bauer." These exhibits are not before us. It does not appear that they were admitted in evidence. We have no knowledge of their contents, and therefore have no means of determining whether they have any bearing on the issues of this case.

The cause was tried by the court. Findings were adopted favorable to the plaintiff. It was determined that the plaintiff is the owner in fee of block 91 in Crescent City, and that he is entitled to the possession thereof. It was also found that the plaintiff had suffered damages in the sum of $75 by reason of the defendants' depriving him of the rightful possession of the property. A judgment was rendered accordingly. From that judgment the defendants have appealed.

The evidence amply supports the findings and judgment that plaintiff is the owner in fee of block 91 in Crescent City, and that he is entitled to the possession thereof, together with damages in the sum of $75. The court was justified in finding, as it did, that the defendants had no right or title to the property in question, and were not entitled to the possession thereof. It clearly appears that title to block 91 in Crescent City never did pass to the defendants' landlord, Otmar Bauer. Neither Reddy nor Bauer is a party to this action. Neither of them ever maintained an action to reform the deeds which they received so as to include therein block 91. Moreover, we are unable to find any evidence that Bauer leased the property to the defendants. The evidence is susceptible of no reasonable theory other than that which was adopted by the trial court.

[1] Since the defendants rely as a defense to this suit in ejectment upon their claim of equitable title which is adverse to, and is not disclosed in, the chain or legal title to the property, it was necessary for them to affirmatively allege in their answer the particular facts upon which they depend. Assuming, without so deciding, that, if the defendants were the tenants of Otmar Bauer, and that, without their landlord being a party to the action, they could nevertheless maintain an equitable defense to the suit for ejectment, it would be necessary for them to first reform the deed from the heirs of Keller to J. F. Reddy, so as to include block 91 therein. Then they would be required to also reform the deed from Reddy to Otmar Bauer in the same manner. In other words, before the defendants could defeat the legal title of the plaintiff, it would be necessary for them to prove they were entitled to affirmative relief by way of reformation of the last-mentioned deeds to Reddy and Bauer. No such affirmative relief was alleged or sought in the answer of the defendants. The effort to establish evidence of such an affirmative equitable defense was received over the objections of the plaintiff.

[2, 3] A large number of California cases hold that evidence of an affirmative equitable

defense to an action in ejectment, in conflict with the clear legal title to the land, is incompetent, in the absence of specific allegations of the particular facts upon which the defendant relies. Kentfield v. Hayes, 57 Cal. 409; Arguello v. Bours, 67 Cal. 447, 8 P. 49; Lowe v. Alexander, 15 Cal. 296; Miller v. Fulton, 47 Cal. 146; McCauley v. Fulton, 44 Cal. 355, 362; Love v. Watkins, 40 Cal. 547, 557, 6 Am. Rep. 624; Bruck v. Tucker, 42 Cal. 346; Davis v. Davis, 26 Cal. 23, 39, 85 Am. Dec. 157; Piercy v. Sabin, 10 Cal. 22, 70 Am. Dec. 692; Mayer v. West, 96 Cal. App. 31, 273 P. 849; Dondero v. O'Hara, 3 Cal. App. 633, 86 P. 985; Pomeroy's Code Remedies (5th Ed.) p. 908, § 555; 19 C. J. 1147, § 178.

The reason for this rule is that the plaintiff may be informed of the special equitable defense upon which the defendants rely when the chain of legal title contains no evidence of such claim. The rule is peculiarly applicable under a statute such as California has which requires the defendants to set up in their answer new matter upon which they rely for a defense. Section 437, Code Civ. Proc. The rule is well stated in Freeman v. Brewster, 70 Minn. 203, 72 N. W. 1068, 1070:

"The following is the true test as to whether, in action of ejectment, a defendant can prove an equity under a general denial: If he has an equitable estate, which, as it exists and without any affirmative relief, defeats plaintiff's claim to the possession, it may be proved under a general denial, being strictly defensive in its nature. But, if the equity is such that it does not give the defendant the right of possession as against the legal title without affirmative relief enforcing the equity, then the defendant must plead the facts entitling him to such relief, the matter being in the nature of a counterclaim."

While there is some confusion among the authorities of other jurisdictions regarding the question as to whether a general denial of the allegations of a complaint in ejectment entitles a defendant to prove an independent equitable defense, the great weight of authority is to the effect that equitable defenses must ordinarily be affirmatively alleged in the answer. In Pomeroy's Code Remedies (5th Ed.) p. 909, it is said in this regard:

"An equitable defense to the action must, however, as it seems, be specially pleaded; and the defense that a deed to the plaintiff absolute on its face, under which he claims title, is only a mortgage."

So also it is said in 19 C. J. p. 1147, § 178, in that regard: "Equitable defenses must be specially pleaded in most jurisdictions and cannot be shown under a general denial or general issue. But in some jurisdictions evidence of equitable defenses is admissible under a general denial, at least if the complaint fails to set out the source of plaintiff's title, and in some states it depends upon whether the equity is strictly defensive or whether it is an equity for affirmative relief which when obtained will furnish a defense, the equity being available under the general denial in the former case, while in the latter case it must be specially pleaded by way of counterclaim. Thus it is generally held that where an equitable title is not pleaded evidence showing such a title is not admissible, and that unless expressly pleaded defendant cannot show that a deed in plaintiff's chain of title absolute in form was intended as a mortgage, or that defendant was in possession under a contract with plaintiff's grantor."

This statement of the rule is supported by numerous California authorities. The statement of the preceding text that a defense to a suit in ejectment may not be maintained by proof that the defendant holds possession under a contract with the plaintiff's grantor without first affirmatively alleging in his answer that equitable defense is supported by the California case of Dondero v. O'Hara, 3 Cal. App. 633, 86 P. 985. In the present case, the defendants attempt to do precisely that thing. Under a general denial, they seek to prove that the plaintiff's grantors had agreed to convey the property in question to the defendants' landlord. That equitable defense is not available under a general denial.

In support of the appellants' assertion that they have a right under a general denial to introduce evidence of any fact which may tend to show that the plaintiff has no right to possession, the following cases are cited: Sparrow v. Rhoades, 76 Cal. 208, 18 P. 245, 246, 9 Am. St. Rep. 197; Nelson v. O'Brien, 139 Cal. 628, 73 P. 469; and Cooper v. Miller, 113 Cal. 238, 45 P. 325. These cases are readily distinguishable from the present action. In the Cooper Case last cited, the plaintiff brought a suit in ejectment alleging that he was the owner and entitled to the possession of certain property. He relied on a tax title deed which he obtained at sheriff's sale. The answer was not a general denial of the allegations of the complaint. The defendant affirmatively alleged that the plaintiff's deed was void, for the reason that the tax levy was illegal. Judgment was rendered for the plaintiff. The court in effect held that both the tax levy and the plaintiff's deed were valid.

The question of a failure to affirmatively plead in the answer an asserted equitable defense was not involved in that case. Moreover, the defendant was attacking the validity of the very deed upon which the plaintiff relied for title, rather than affirmatively asserting an independent equitable defense which he must establish to justify his own possession of the property.

In the case of Nelson v. O'Brien, supra, in answer to an ordinary suit in ejectment, the defendant affirmatively alleged that certain deeds and a judgment upon which the plaintiff relied for title were defective in form. This special "criticism" of certain "pretended deeds" in the plaintiff's chain of title was stricken from the answer. Judgment was rendered for the plaintiff. On appeal, the Supreme Court merely said these allegations were unnecessary; that defendant could have objected to any void or defective instrument in the plaintiff's chain of title without the special evidentiary allegations which were recited in the answer. This case did not involve a failure to affirmatively allege an asserted equitable defense inuring to the benefit of the defendant. It merely determined that it was not necessary to allege defects in the instrument upon which the plaintiff relied which rendered them void.

In the case of Sparrow v. Rhoades, upon which the appellants rely, under a general denial of the allegations of ownership and the right of possession in an ejectment suit, judgment was awarded the defendant upon proof that the deed which the plaintiff procured from the United States was in conflict with section 2262 of the Revised Statutes of the United States, and therefore void. The court said in that regard: "Evidence was admissible to show that the title, which on the face of the deed appeared to have passed to the plaintiff, could not have done so, and that the deed was worthless as a muniment of title."

It thus appears that the defendant in that case was not relying on proof of an independent equitable defense in his favor, but rather upon an attack on the validity of the deed upon which the plaintiff relied for his title to the property.

None of the cases upon which the appellants rely involved the pleading or proof of an affirmative equitable defense on the part of the respective defendants. Each of these cases involved alleged facts which were deemed to render the plaintiffs' deeds invalid and void. These cases are not in conflict with the general rule which requires a defendant to specially plead any independent equitable defense to an action in ejectment upon which he relies to defeat the plaintiff's legal title.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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2 Cal.App.2d 600

UNION BANK & TRUST CO. OF LOS ANGELES v. LOS ANGELES COUNTY.

Civ. 8848.

District Court of Appeal, Second District, Division 2, California.

Dec. 5, 1934.

Hearing Denied by Supreme Court Jan. 31, 1935.

1. Counties 🔑210

Action for money had and received lies against county in proper case (Pol. Code, §§ 4075, 4076, 4078).

2. Counties 🔑222

Rule that common count for money had and received is not subject to demurrer is inapplicable to actions against counties, since in such actions demand is essential element (Pol. Code, §§ 4075, 4076, 4078).

3. Money received 🔑17(1)

Approved usual form of count for money had and received consists only in stating that defendant is indebted to plaintiff in certain sum for money had and received by defendant to and for plaintiff's use.

4. Counties 🔑213

Cause of action against county for money had and received does not accrue until rejection of claim therefor (Pol. Code, §§ 4075, 4076, 4078).

5. Counties 🔑222

Claim presented to board of supervisors *held* part of statement of cause of action against county where claim was incorporated in complaint by proper reference (Pol. Code, § 4075).

6. Evidence 🔑44

Court of Appeal judicially knows that county clerk and his deputy are ex officio clerks of superior court (Pol. Code, § 4152; Const. art. 6, § 14).

7. Evidence 🔑43(1)
Court of Appeal takes judicial notice that exhibits received at trials are placed in clerk's custody (Code Civ. Proc. § 1954; Pol. Code, § 4152; Const. art. 6, § 14).

8. Pleading 🔑6
Facts of which court takes judicial notice need not be pleaded, and will be considered by court on demurrer, although not pleaded.

9. Pleading 🔑214(5)
On demurrer to complaint, court could not consider conclusions of law therein.

10. Officers 🔑103
Where public officer is ex officio incumbent of another public office, such offices are as distinct as though occupied by different persons.

11. Clerks of courts 🔑9
Courts 🔑50
Each department of superior court constitutes court, and clerk of each department is clerk of such court.

12. Clerks of courts 🔑69
Clerks' duties are generally to serve court in ministerial capacity, act as custodians of records, and perform duties prescribed by law or court.

13. Attachment 🔑64
Property in legal custody of clerk of court is in custody of law and cannot be attached, seized, or distrained without leave of court.

14. Attachment 🔑64
Money in legal custody of clerk of court as exhibit is in custody of law, but may become subject to legal process after termination of case unless court otherwise directs (Code Civ. Proc. §§ 1952, 1954).

15. Deposits in court 🔑3
Generally, funds deposited with clerk are not in custody of law in absence of court order to make such deposit.

16. Deposits in court 🔑12
Where money was received as exhibit and was intrusted to clerk subject to court order, court alone had power to order disposition of money after termination of case as regards county's liability to repay money after clerk's noncompliance with demand therefor (Code Civ. Proc. §§ 1952, 1954; Pol. Code, §§ 4075, 4152; Const. art. 6, § 14).

17. Deposits in court 🔑12
County *held* not liable for money delivered as exhibit and intrusted to county clerk as ex officio clerk of superior court, in absence of proof of receipt thereof by county or conversion to county's benefit (Code Civ. Proc. §§ 1952, 1954; Pol. Code, §§ 4075, 4152; Const. art. 6, § 14).

18. Counties 🔑146
Neither county nor board of supervisors can control county clerk while acting as ex officio clerk of superior court, and as clerk of court he is not answerable to county nor is county liable for his torts (Pol. Code, §§ 4075, 4152; Const. art. 6, § 14).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by the Union Bank & Trust Company of Los Angeles, as executor of the estate of Charles H. Crawford, deceased, against Los Angeles County. Judgment for defendant, and plaintiff appeals.

Affirmed.

O. A. Ehlers and Loeb, Walker & Loeb, all of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondent.

WILLIS, Justice pro tem.

From a judgment entered in favor of defendant county of Los Angeles, after an order sustaining a general demurrer to each of two causes of action in the complaint without leave to amend, plaintiff appealed.

The complaint contained four separately stated causes of action, the second and third not being involved in this appeal and no further reference will therefore be made to them. The first cause alleges the corporate character of plaintiff, appellant herein, and its representative capacity as executor of the estate of Charles H. Crawford, deceased, who died on or about May 20, 1931; that defendant county of Los Angeles, respondent herein, was and is a municipal corporation and body politic; that L. E. Lampton during all the times mentioned was and is the county clerk of said county and that Liberty Hill was during all of said times the chief deputy county clerk to and including July 1, 1932; that by virtue of their respective offices they were clerk and chief deputy clerk, respectively, of the superior court in and for Los Angeles county, charged with the duty of keeping and preserving all documents, money, and other property introduced in evidence as exhibits in actions brought and tried in said court; that on or about March 13, 1930, said Charles H. Crawford delivered to and bailed with said

Lampton and Hill $75,000 in lawful money of the United States, for the purpose of introducing the same in evidence as an exhibit in a certain criminal action then pending in said court; that said Lampton and said Hill accepted said money for said purposes and undertook to keep, care for, and preserve the same, and to return it to said Crawford upon demand after conclusion of the trial of said action; that said trial was completed on or about July 11, 1930, judgment therein being affirmed on appeal on or about July 30, 1931; that thereafter said Crawford demanded of defendants that said $75,000 be returned to him, but that defendants have failed and neglected and still fail and neglect to return said sum or any part thereof to said Crawford or to plaintiff; that on or about August 31, 1932, plaintiff presented to the board of supervisors of said county its written claim and demand for payment of said sum of money, a copy of which claim is attached to and made a part of the complaint; that on or about September 19, 1932, said board rejected said claim. The claim referred to and incorporated in the complaint recites that about March 13, 1930, Charles Crawford delivered to the district attorney of Los Angeles county the sum of $75,000, lawful money of the United States, for the purpose of using the same as an exhibit in a criminal action then pending in the superior court in and for Los Angeles county; that said money was placed in evidence at the trial of said case and placed in the custody and safekeeping of L. E. Lampton, county clerk, and Liberty Hill, chief deputy county clerk of said county, to be by them safely kept and returned to said Crawford upon the conclusion of the trial; that said trial was concluded and judgment therein became final on July 31, 1931, but that return of said money to Crawford was prevented by a temporary injunction; that within one year prior to making this claim said claimant had demanded return of said money, but that the return thereof has been and still is refused; that claimant is informed that said money was converted to the use and benefit of and embezzled by said Liberty Hill.

The fourth cause of action alleges the corporate capacity of plaintiff, the governmental capacity of defendant county of Los Angeles, the death of said Charles H. Crawford, and the representative capacity of plaintiff as his executor; that L. E. Lampton has been during all times therein mentioned and still is county clerk of said county and that Liberty Hill was during all said times up to about July 1, 1932, chief deputy county clerk; that about August 31, 1932, plaintiff presented to the board of supervisors a claim for $75,000, a copy of which is attached to and made a part of this cause of action, and which is hereinbefore recited in substance; that said claim was rejected on September 19, 1932. Then follows this additional allegation: "Within two years last past defendants county of Los Angeles, L. E. Lampton and Liberty Hill, and each of them, became indebted to plaintiff's intestate in the sum of $75,000.00 for money had and received to the use and benefit of plaintiff's intestate. No part of said sum has been repaid though demand therefor has been made, and the whole thereof is now due, owing and unpaid."

Appellant propounds three questions in its brief, as follows: (1) Where money belonging to A is introduced in evidence as an exhibit in a criminal action pending in the superior court against B (to which action A is in nowise a party), and thereby placed by the court in the custody of the county clerk for safekeeping, is the county obligated to return such money upon the conclusion of the criminal action? (2) May a county be liable for money had and received? (3) Is a common count for money had and received subject to general demurrer?

An orderly and logical disposition of these questions requires that the procedural law questions be determined before we approach the question of liability.

[1] The answer to question No. 2 must be affirmative. An action for money had and received will lie against a county in a proper case after presentation and rejection of a claim therefor. For the basis of such a cause of action is that the defendant county has received money which belongs to plaintiff and which in equity and good conscience it ought to pay to plaintiff. In such a case equity interposes and supplies the implied promise to repay, thereby creating an implied contract which is within the scope of obligations or liabilities upon which counties may be sued under the procedure presented by statute. Section 4075, Pol. Code; Price v. County of Sacramento, 6 Cal. 255; Colusa County v. Glenn County, 117 Cal. 434, 49 P. 457; County of Tulare v. County of Kern, 132 Cal. App. 462, 22 P.(2d) 750. To the same effect is the case of Trower v. City and County of San Francisco, 157 Cal. 762, 109 P. 617, cited by appellant, but therein it was also held that presentation of a claim in that case as a prerequisite to suit was not required by the organic act governing the city and county of San Francisco as it then existed. This question and

answer deals only with the substantive aspect of the right of action to recover money had and received to and for the use of another, as distinguished from the adjective question of the manner and form of pleading in such cases, which is involved in appellant's question No. 3.

[2-4] The common count for money had and received is not subject to successful attack by either general or special demurrer. McDonald v. Pacific Debenture Co., 146 Cal. 667, 80 P. 1090; Fox v. Monahan, 8 Cal. App. 707, 97 P. 765; Pike v. Zadig, 171 Cal. 273, 152 P. 923; Camp v. Boyd, 41 Cal. App. 83, 182 P. 60; Lehner v. McLennan, 54 Cal. App. 491, 202 P. 41; Firpo v. Pacific Mut. Life Ins. Co., 80 Cal. App. 122, 251 P. 657; Auckland v. Conlin, 203 Cal. 776, 265 P. 946. This settled rule, however, does not attach to actions against counties for money had and received, for in such actions the common count is not available in its ordinary naked form. The approved and usual form of this count is very simple, consisting only in stating that defendant is indebted to plaintiff in a certain sum "for money had and received by the defendant to and for the use of plaintiff." 1 Chitty's Pleading (16th Am. Ed.) 362. Demand need not be stated and is not essential to the sufficiency of the complaint. Quimby v. Lyon, 63 Cal. 394; Dunham v. McDonald, 34 Cal. App. 744, 168 P. 1063; Piper v. Somerville, 128 Cal. App. 667, 17 P.(2d) 1027. Demand is, however, an essential and prerequisite to the sufficiency of a cause of action based on a claim for money had and received where a county is defendant. Section 4075 of the Political Code provides that no suit shall be brought on any claim against a county until such claim has been presented as therein provided and rejected in whole or in part. Section 4076 prescribes the form of such claim, and section 4078 prescribes a limitation of time within which suit thereon may be brought. Under provisions of law of this character, relating either to cities or counties, it has always been held in this state that the presentation of a demand in the manner provided is a necessary prerequisite to the maintenance of a suit against such public corporation to recover money, and that a complaint containing no such allegation fails to state a cause of action. Farmers, etc., Bank v. City of Los Angeles, 151 Cal. 655, 91 P. 795; Mello v. County of Tulare, 99 Cal. App. 268, 278 P. 465; Beeson v. City of Los Angeles, 115 Cal. App. 122, 130, 300 P. 993. The cause of action does not accrue in such case until such claim is presented and rejected in whole or in part. Spencer v. City of Los Angeles, 180 Cal. 103, 119, 179 P. 163; Coen v. City of Los Angeles, 70 Cal. App. 752, 762, 234 P. 426. The necessity of demand in a form which requires a statement of the full details of the nature of the claim adds a new essential to the cause of action and thus renders the common count insufficient and its use unavailable.

[5-9] The demurrer, therefore, to the fourth cause of action was not subject to the rule which ordinarily governs where a demurrer is made to the common count, but the issue of law created thereby was properly for trial by the lower court the same as in the ordinary action where the facts are fully stated and where a general demurrer is made challenging the sufficiency of the facts stated in the complaint to constitute a cause of action against the defendant. In contemplating what facts are stated in this cause of action the claim presented to the board of supervisors must be considered as a part of the pleading. The facts recited therein were made a part of the statement of the cause of action by incorporating it therein in haec verba by proper reference. Silvers v. Grossman, 183 Cal. 696, 192 P. 534. Having done so, the suit becomes one based on the claim (section 4075, Pol. Code), and the sufficiency thereof as basis for relief must appear. It will be noted that this cause omits the allegation contained in the first cause relative to the ex officio status of defendants Lampton and Hill as clerk and chief deputy clerk of the superior court in and for Los Angeles county, respectively, and their being charged with the duty of keeping and preserving money or other property introduced in evidence as exhibits in actions tried in that court. This omission, however, is supplied from judicial knowledge furnished by the law of this state. The county clerk is ex officio the clerk of the superior court of the state of California in his particular county. Const. art. 6, § 14; Pol. Code, § 4152. A deputy county clerk is also ex officio a clerk of the superior court, and his authority is coextensive with that of his principal. People v. Collins, 6 Cal. App. 492, 92 P. 513; Touchard v. Crow, 20 Cal. 150, 81 Am. Dec. 108. We also take notice that exhibits received at trials therein are placed in the custody of the clerk of the court. In civil actions the rule in this state is that facts of which the court will take judicial notice need not be pleaded. Such facts will be considered by the court on demurrer, although not pleaded. Loranger v. Nadeau, 215 Cal. 362, 10 P.(2d) 63, 84 A. L. R. 1264. And under our view of the nature of the fourth cause

herein, there must be excluded from consideration thereof the allegations that defendants "became indebted to plaintiff's intestate" and that the whole amount alleged is now "due" and "owing," as these quoted allegations are clearly conclusions of law, not available or tolerated except in those cases wherein our courts have held the common count to be sufficient. With these facts thus supplied to the fourth cause by judicial notice, and with the exclusion of the conclusions of law therein, it is apparent that the first and fourth causes are founded on the same facts and constitute one and the same cause of action with one and the same character and measure of relief. In which case it is proper to ignore the so-called money had and received cause or count as a separate and distinct cause of action.

This disposition of plaintiff's pleadings somewhat changes the premises in appellant's first question relating to liability. Instead of predicating the question on custody of money exhibits by the county clerk, we must base it on the premise that the custody thereof was in the clerk of the superior court of the state of California in and for the county of Los Angeles. The question correctly restated is, therefore, as follows: Is the county obligated to repay to the owner thereof, or his personal representative, money delivered into the custody of the clerk of the superior court as an exhibit in the trial of a case pending in such court and not returned by the clerk when rightfully demanded?

[10-16] As previously stated, the county clerk is by law made ex officio the clerk of the superior court of the state of California in his particular county. Where a public officer is declared by law by virtue of his office—ex officio—to be also the incumbent of another public office, the two offices are as distinct as though occupied by different persons. People v. Edwards, 9 Cal. 286; People v. Durick, 20 Cal. 94; Lathrop v. Brittain, 30 Cal. 680; People v. Kelsey, 34 Cal. 470; People v. Ross, 38 Cal. 76; Swinnerton v. Monterey County, 76 Cal. 113, 18 P. 135; Webster v. Board of Education, 140 Cal. 331, 73 P. 1070; More v. Board of Supervisors, 31 Cal. App. 388, 160 P. 702; Hammond Lumber Co. v. Moore, 104 Cal. App. 528, 535, 286 P. 504. Each of several departments of the superior court in a county is a court, and the clerk of each department is the clerk of that court. Keller v. Gerber, 49 Cal. App. 515, 193 P. 809. The duties of clerks are in general to serve the court in a ministerial capacity, to act as custodians of its records, and to perform such duties as are prescribed by law or imposed by the lawful authority of the court. Under section 1954 of the Code of Civil Procedure material objects may be admitted in evidence at the trial of a case under the sound discretion of the court. Upon admission of such material or demonstrative evidence the object is taken into physical custody by the clerk of the court, subject to the order of court for its subsequent disposition. Section 1952 of the same Code, added in 1931 (St. 1931, p. 407), recognizes this character of custody in authorizing the court to order destruction or other disposition of any exhibit, except lien and title instruments, introduced in evidence in the trial of a civil action, where such exhibit remains "in the custody of the court" for a certain period. It is a well-known rule that property or funds in the legal custody of the clerk of a court, as such, are in the custody of the law and cannot be attached, seized, or distrained without leave of court. The custody of the officer, however, is not necessarily nor always the custody of the law. While money is in legal custody of the clerk of the court as an exhibit in a criminal action, the custody is that of the law. After final conviction and the termination of the case, the purpose of legal custody of the money is presumably accomplished, and it may become subject to legal process unless the court otherwise directs. Emmanuel v. Sichofsky, 198 Cal. 713, 247 P. 205, 48 A. L. R. 580. In respect to deposits with the clerk, the general rule is that before funds may be said to be in the custody of the law, when delivered to the clerk of the court, an order of court is required to make such deposit with the clerk. Colver v. W. B. Scarborough Co., 73 Cal. App. 455, 238 P. 1110. Herein the money in question was received in evidence as an exhibit under order and direction of the court, and by the court given into the custody of the clerk for safe-keeping and subject to further order of the court. The court alone had power to order disposition of the money after the purpose of such legal custody had been accomplished.

[17] There is no allegation in the complaint, or in the claim on which it is based, that this money or any part of it was ever received by the county, or ever used or expended for or to the benefit of the county. The liability of the county for the return of this money can only be based on allegations and proof of receipt thereof or a conversion thereof to the use or benefit of the county. Herzo v. San Francisco, 33 Cal. 134; Municipal Bond Co. v. City of Riverside, 138 Cal.

App. 267, 32 P.(2d) 661; Papeschi v. La Cava, 93 Cal. App. 209, 269 P. 731. And under the allegations it is made clear that the clerk of the court did not receive it as the agent of the county nor in any way for it, or on its behalf. Therefore the county did not become the debtor for this money, nor liable to recovery thereof as of moneys had and received to and for its use and benefit. Dewey v. Board of Supervisors of Niagara County, 62 N. Y. 294; Gray v. Board of Sup'rs of Tompkins County, 93 N. Y. 603; Estep v. Keokuk County, 18 Iowa, 199; Randles v. Waukesha County, 96 Wis. 629, 71 N. W. 1034.

[18] In the early case of Sherbourne v. Yuba County, 21 Cal. 113, 81 Am. Dec. 151, the Supreme Court held that a quasi corporation, like a county, is not liable for the acts of officers or employees which it appoints in the exercise of a portion of the sovereign power of the state, by the requirement of public law, and simply for the public benefit, and for a purpose from which the county, as a corporation, derives no benefit. In the case of Crowell v. Sonoma County, 25 Cal. 313, the same court held "that the relation between a county and its road overseer, bears no available resemblance to that of master and servant, nor to that of employer and employee. The office of road overseer in the defendant county, was not created by that county, but by public law instead, and all the duties connected with the office were created in like manner. The county had no power even to designate the incumbent of the office, for by the Act referred to, the power of appointing road overseers is conferred upon the Board of Supervisors; and in exercising that power the Board acts not under the county, but under the law." The instant case parallels the one just quoted. Under the charter governing Los Angeles county, the board of supervisors appoints the county clerk. The Constitution and Code provisions make such county clerk ex officio clerk of the superior court in his county. Neither the county as a public corporation nor its board of supervisors had power to direct or control any action of the county clerk while acting in the capacity of clerk of the superior court. The duties of such clerk are prescribed by general law of the state and by orders of the court of which he is clerk. As such clerk, he is not answerable to the county, nor is the county liable for his tortious acts. Municipal Bond Co. v. City of Riverside, supra. The receipt of the money in evidence and its bailment to the clerk of the court as alleged in the complaint was a transaction between the owner of the money on the one hand and the court and its clerk on the other, to which the county of Los Angeles was a stranger and therefore unaffected by and not responsible for any subsequent loss or misappropriation of such money while in the custody of such clerk.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

HAYNES v. ANNANDALE GOLF CLUB.*

Civ. 8990.

District Court of Appeal, First District,
Division 1, California.
Nov. 28, 1934.

Rehearing Denied Dec. 28, 1934.
Hearing Granted by Supreme Court
Jan. 25, 1935.

1. Clubs 🔑7

Club by-laws *held* to vest board of directors with discretion of accepting or rejecting resignation of member and hence member could not avoid liability for dues and assessments by resigning when resignation was not accepted by board of directors (Civ. Code, §§ 598, subd. 4, 602).

> By-laws provided that the resignation of any member should be made in writing and addressed to the board of directors, and that no resignation of a member should be effective until accepted by the board, nor should the resignation be accepted while such member was in anywise indebted to the club, nor until he had assigned and delivered his certificate of membership, and that, until the transfer of the certificate of membership on the books of the corporation, or until the date of the expulsion of a member, the record owner of each membership should be and remain liable for all dues, fees, or other charges which had accrued or might thereafter accrue.

2. Evidence 🔑66

Member of club is presumed to have knowledge of its by-laws, and cannot escape liability arising thereunder by pleading ignorance thereof.

3. Clubs 🔑4

Courts will set aside club by-laws that are unreasonable, but only where unreasonableness thereof clearly appears.

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 47 P.2d 470.

4. Clubs ⚷7

Club by-law providing that resignation of member should not be effective until accepted by board of directors, and that record owner of each membership should remain liable for all dues, fees, or other charges *held* not unreasonable, notwithstanding member might be unable to pay his dues, or might have removed from locality (Civ. Code, §§ 598, subd. 4, 602).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action for declaratory relief by John R. Haynes against the Annandale Golf Club. Judgment for defendant, and plaintiff appeals.

Affirmed.

J. Wiseman Macdonald, of Los Angeles, for appellant.

O'Melveny, Tuller & Myers and Graham L. Sterling, Jr., all of Los Angeles, for respondent.

JAMISON, Justice pro tem.

Plaintiff, being a regular member of defendant corporation, a nonprofit social club, sought to resign as such member and thereby terminate his liability to pay club dues and assessments. Defendant refused to accept the resignation and cancel the membership for the claimed reason that said resignation was ineffective under its by-laws. Thereupon plaintiff brought this action for declaratory relief to have it determined that he is no longer a member of respondent corporation and is not liable for any further dues or obligations as such. Judgment was rendered against him and in favor of defendant, and from this judgment plaintiff appeals.

The appeal is brought up on a bill of exceptions which contains an agreed statement of facts. From this statement it appears that the respondent club is a nonprofit corporation with two kinds of memberships, namely, regular and special. In 1916 appellant applied for membership, as a regular member, and in his application he agreed to abide by the constitution, by-laws, and rules of the defendant corporation. He was accepted as a regular member and thereafter remained such until September 18, 1931, at which date he tendered his resignation to take effect at once; at the same time he indorsed his certificate of membership in blank and delivered it to respondent for cancellation. Respondent's board of directors has refused to accept said resignation or cancel said certificate, and, since September 18, 1931, the certificate has been retained uncanceled by respondent, who notified appellant of its willingness to return said certificate to him if he so desired. Such portions of the by-laws as are necessary for a discussion of the case are as follows:

Section 10, article II, provides in part that "a certificate of membership shall be valid only when held by and registered in the name of a member of the Club, and shall be subject to all By-Laws and rules and regulations of the Board of Directors then in force and thereafter adopted, and * * * shall be considered as an essential part of the contract of membership between the Club and such member."

Section 11 of article II provides for the sale and transfer of a certificate of membership to any candidate for membership who, having made application to become a member in the usual manner, has been elected by the board of directors and has paid the transfer fee of $250.

Prior to February 8, 1930, section 12 of article II of the by-laws provided for the resignation of a member as follows: "The resignation of any member shall be made in writing addressed to the Board of Directors. No resignation of a member shall be effective until accepted by the Board of Directors, nor shall the same be accepted while such member is in anywise indebted to the Club, nor until he has assigned and delivered to the Club his certificate of membership."

On February 8, 1930, said section 12 was amended to read as follows: "The resignation of any member shall be made in writing addressed to the Board of Directors. No resignation of a member shall be effective until accepted by the Board of Directors, nor shall the same be accepted while such member is in anywise indebted to the Club, nor until he has assigned and delivered his certificate of membership. Until the transfer of the certificate of membership on the books of the corporation, or until the date of the expulsion of a member, the record owner of each membership shall be and remain liable for all dues, fees or other charges which have accrued or which may thereafter accrue."

Respondent contends in support of the judgment that, under the by-laws, in order for the resignation to be effective, it must be accepted by the board of directors, transferred on the books of the corporation, and the certificate of membership assigned and delivered, and until assigned and accepted the directors still have the right to assess appellant as a member of the corporation and compel him to pay dues amounting to the sum of $216 a year for all time in the future.

[1] Subdivision 4 of section 598 of the Civil Code authorizes nonprofit corporations to pass by-laws for the admission, election, appointment, withdrawal, suspension, and expulsion of its members, and section 602 of said Code provides that membership may be terminated in the manner provided in the articles or by-laws unless otherwise provided, etc. The by-laws in question by express terms vest in the board of directors the discretion of accepting or not accepting the resignation of a member, and until accepted by said board the resignation is not effective. As heretofore stated, the said board exercised its discretion against accepting appellant's resignation. Its reason for so doing does not appear. The judgment states that "plaintiff's alleged resignation was and is ineffective under the by-laws of defendant corporation."

In Ewald v. Medical Society, 70 Misc. 615, 130 N. Y. S. 1024, 1031, the court, after stating that a member of a voluntary association could resign in the absence of some statute, rule, or law to the contrary, said: "But if a member of an association enters into a contract with it concerning the duration of his membership, and to the effect that it shall continue until the happening of a certain event, the case is different. Such a contract exists when, as here, the applicant for membership promises in the event of election 'to comply with all rules, regulations and by-laws passed by the society or adopted for its government.' Voluntary associations may adopt such by-laws as they please. When adopted and consented to by any member they become binding upon him as contracts." 6 Cal. Jur., p. 718.

[2] Appellant is presumed to have knowledge of the by-laws and cannot escape liability arising thereunder, or otherwise avoid their operation by a plea of ignorance of them. 14 Cor. Jur., p. 345. In addition to this presumption, in this case appellant signed both the original by-laws and the amendments of 1930, and so presumably had actual knowledge of said by-laws. Such action on his part constituted a contract.

Appellant cites cases from other jurisdictions which hold that a club member may resign by merely giving notice of his resignation, but it seems that in all of these cases the courts emphasized the fact there was no rule or by-law that prohibited the resignation.

[3, 4] Appellant contends that the by-laws are unreasonable so far as same pertain to resignations. In support thereof it is argued that under the present economic depression a member may not be financially able to pay his dues, or he may have removed from the locality in which the club is situated. These are matters which should have been considered by him when he entered into his contract. It might be a hardship under like conditions for the other members to assume his burden. Such facts do not affect or control the reasonableness of the by-laws. While it is a well-recognized rule that courts will set aside by-laws that are unreasonable, before a court will declare a by-law unreasonable its unreasonableness must clearly appear. Thompson on Corporations, 3d Ed. (Bobbs-Merrill), vol. 2, p. 504, § 1102; 14 Cor. Jur., p. 370. In Thompson on Corporations, as above cited, it is said: "But the fact that a court will assume to determine when a by-law is reasonable, contrary to the opinion of the corporators themselves, has its limitations. Thus, if the members of a strictly private corporation or association agree among themselves that a particular by-law is reasonable, and it is not opposed to the law in the sense of being immoral, criminal, or against public policy, the courts will give effect to it as a private contract, and will not set it aside because they may deem it unreasonable."

There is no showing that the board of directors acted without sufficient cause, or arbitrarily, in its failure to accept appellant's resignation. So far as is disclosed by the record, it may have had ample cause to withhold such acceptance. Such being the case, we cannot say that the by-laws relating to resignations are unreasonable or that the board of directors acted arbitrarily in failing to accept appellant's resignation.

Respondent makes the additional point that the assignment of a membership, as provided for under the provisions of section 12, article II, is a condition precedent to the acceptance of a resignation. We cannot agree with this contention. This provision relates exclusively to sales of certificates and not to resignations of members without sale. A discussion of the question is unnecessary considering the conclusion we have reached.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J

2 Cal.App.2d 620

PEOPLE v. SIEGEL.

Cr. 1403.

District Court of Appeal, Third District, California.
Dec. 5, 1934.

1. Criminal law 🔑1159(1)

Where court instructed that if jury found such degree of intoxication that defendant could not give consent to crime against nature, verdict of not guilty should be returned, but jury found defendant guilty, reviewing court was bound to hold that defendant as matter of fact was not so intoxicated as not to have been able to give consent (Pen. Code, §§ 22, 286).

2. Criminal law 🔑1044

Where no objection was interposed when question was propounded to witness, and, after it was answered, no motion was made to strike out answer, it is too late to raise question of admissibility for first time on appeal.

3. Criminal law 🔑1202(7)

Where defendant while on witness stand admitted his prior conviction for felony, admission of record of conviction *held* not prejudicial (Code Civ. Proc. § 2051).

◆

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Sisto Siegel was convicted of the crime against nature, and he appeals.

Affirmed.

J. C. Hurley, of Ukiah, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The appellant and one Clifford Anderson were indicted by the grand jury of the county of Mendocino and charged with the crime set forth and specified in section 286 of the Penal Code.

The record shows that Clifford Anderson was the actor at the invitation of the defendant Siegel and Siegel was the one acted upon by the defendant Anderson. The record does not show that Anderson has ever been brought to trial. The defendant, upon trial, was found guilty of the crime charged in the indictment and from the judgment pronounced upon the verdict of the jury this appeal is prosecuted. Two propositions are presented for consideration: (1) That the verdict is contrary to the evidence; (2) that the court erred during the trial in the admission of evidence.

The testimony is of such a character and the facts detailed by the testimony are so repulsive that we refrain from quoting the testimony in this opinion, but will state that we have carefully read the same and that it shows the following circumstances:

That the two defendants were discovered by the witnesses Harry Newberg and D. R. Henderson in the act of committing the very crime made punishable by section 286 of the Penal Code; that the testimony of Newberg sets forth facts from which the jury could not reasonably avoid the conclusion that the act of penetration was complete. The testimony of the witness Newberg is more direct and specific than that of the witness Henderson, but is corroborated by the witness Henderson in all of its general circumstances. Some attempt was made to show that the witness Henderson was somewhat under the influence of intoxicating liquor. So far as we have been able to discover, no attempt was made to likewise impeach the testimony of the witness Newberg. The acts constituting the offense were committed a short distance from the place where a dance was being held during the evening.

[1] It is contended on the part of the appellant that he was so intoxicated as to be unable to give consent. In this particular, the court instructed the jury that if they believed the defendant was so under the influence of intoxicating liquor as not to be able to give his consent to the act in question, then the jury should return a verdict of not guilty.

While section 22 of the Penal Code specifies that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition, but whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act. The instructions of the court specifically covered the question of intoxication and directed the jury if they found such a degree of intoxication that defendant was unable to give his consent, then and in that case, a verdict of not guilty should be returned. This, of course, covers the question of motive and intent as clearly as though the section had been read to the jury.

The jury having found the defendant guilty, we are bound thereby to hold that the defendant, as a matter of fact, was not so intoxicated as not to have been able to give consent.

[2] The errors of law complained of relate to the admission of testimony upon being discovered in the act referred to herein. The witness Newberg demanded of the defendants as to what they were doing. The defendant Clifford Anderson replied that Siegel had requested him to perform the particular act and that he did so. This language is ours. The reply of the participant Anderson is so vile that we exclude it from this opinion.

The admission in testimony of the reply of Anderson to the question propounded by Newberg was assigned as prejudicial error. Our examination of the record, however, shows that no objection was interposed at the time the question was propounded, and after it had been answered, no motion was made to strike out the answer. It is too late to raise such a question for the first time on appeal.

[3] It is also objected that the court erred in admitting the record of appellant's former conviction of a felony. Section 2051 of the Code of Civil Procedure sets forth that a witness may be impeached by asking him if he has not been formerly convicted of a felony or by introducing the record of such a conviction. In the case at bar, the appellant, while on the witness stand, was asked if he had not been convicted of a former felony and replied that he had. Following this, the record of his conviction was offered in evidence by the prosecution and admitted. Appellant, having admitted his conviction of a former felony, we do not perceive how he was prejudiced by the admission of the record. The appellant's own testimony on cross-examination shows that he was convicted of a sexual offense in connection with a young girl, and the record thereof could not add anything to the nature and character of the offense.

Instructions given by the court were exceedingly fair and covered all the issues involved in the case. A reading of the testimony shows that the jury were amply justified in concluding that the offense with which the defendant was charged was established beyond all reasonable doubt. We may add, any other conclusion would have been a miscarriage of justice.

Finding no merit in the appeal, the judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

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2 Cal.App.2d 664

BURBANK v. CONTINENTAL LIFE INS. CO.

Civ. 9072.

District Court of Appeal, First District, Division 1, California.

Dec. 7, 1934.

Hearing Denied by Supreme Court Feb. 4, 1935.

1. Judgment ⚷363

Trial court has discretion to grant relief from judgment or order in case of mistake, inadvertence, surprise, or excusable neglect (Code Civ. Proc. § 473).

2. Appeal and error ⚷982(1)

Trial court's decision on application for relief from judgment or order will not be disturbed in absence of clear showing of abuse of discretion, and appellant has burden as matter of law to show that discretion was abused (Code Civ. Proc. § 473).

3. Appeal and error ⚷935(1)

Appellate tribunals on appeal from order setting aside judgment will resolve any doubts in favor of applicant for relief from judgment (Code Civ. Proc. § 473).

4. Judgment ⚷381

Trial court has inherent power to correct mistakes in its proceedings on its own motion and within reasonable time to annul its orders inadvertently made.

5. Dismissal and nonsuit ⚷81(5)

Order annulling order dismissing action and restoring motion for dismissal for determination, upon showing that plaintiff understood additional time would be allowed to file counter affidavits, *held* not abuse of discretion (Code Civ. Proc. § 473).

6. Dismissal and nonsuit ⚷81(5)

Plaintiff's failure to procure and file additional counter affidavits within one month following hearing of motion to dismiss did not as matter of law prevent setting aside order of dismissal on ground of misunderstanding (Code Civ. Proc. § 473).

◆

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by D. W. Burbank against the Continental Life Insurance Company. From an order vacating a former order which dismissed the action and restoring the motion for dismissal for further hearing and determination on the merits, defendant appeals.

Affirmed.

Peter tum Suden and Richard tum Suden, both of San Francisco, for appellant.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Bianchi & Hyman, of San Francisco, for respondent.

KNIGHT, Justice.

Exercising the discretionary power granted by section 473 of the Code of Civil Procedure and on plaintiff's motion, the trial court vacated an order dismissing the above-entitled action and restored for further hearing and determination on the merits the motion for dismissal theretofore made by defendant. The order vacating was based upon findings of inadvertence and mistake, and defendant has appealed therefrom. We find no legal ground warranting interference with the exercise of the trial court's discretion.

The order of dismissal was granted by the court pursuant to a motion made by defendant under the authority of section 583 of the Code of Civil Procedure which at the time these proceedings took place provided: "The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after answer is filed to bring such action to trial." The motion for dismissal came on for hearing on October 17, 1932, at which time the clerk entered a minute order reciting that on that day said motion was ordered submitted for decision; and on November 17, 1932, a second minute order was entered to the effect that said motion having been theretofore submitted, was granted; and on December 2, 1932, the clerk recorded a formal judgment of dismissal in the judgment book. Before the recordation of said judgment, however, and on November 30, 1932, plaintiff served and filed his notice of motion to vacate the minute order of November 17, 1932. The motion was based upon the claim, supported by affidavits, that at the time the motion to dismiss was heard on October 17, 1932, the court stated in substance, as plaintiff (who is an attorney) and his counsel understood its remarks, that it desired additional counteraffidavits, and that further time would be granted to procure and file the same, following which the order for the submission of the motion to dismiss would be entered; but that before plaintiff procured and filed said additional affidavits the motion to dismiss was granted. Attached to the notice of motion to vacate were the additional counter affidavits plaintiff had intended to file in opposition to the motion to dismiss. They were made by two attorneys who at different times represented plaintiff prior to the proceedings taken to dismiss the action.

In deciding the motion to vacate, the trial court filed a written opinion (which plaintiff has printed in full in his brief) wherein its views are fully expressed; and afterwards these views were embodied in its final order in the form of findings. It is evident therefrom, and from the statements set forth in the written opinion, that the trial court in effect agreed and to all intents and purposes held that the understanding of plaintiff and his counsel of the remarks made by the court on October 17, 1932, was doubtless justified and well founded. In this regard in its opinion the court said: "It may be true that this affiant, Bianchi [attorney for plaintiff], understood the court to rule that additional affidavits could be filed on either side, and tha when all additional affidavits had been filed the matter would be submitted. The court has no recollection regarding same, and it is possible the court may have made that statement. If so, and the plaintiff was misled in any way thereby into the belief that he would have the opportunity of filing additional affidavits, then the court should vacate the order of dismissal, restore the matter to the calendar for further hearing on the motion to dismiss, and allow both sides to present all necessary and proper affidavits regarding the situation." And in its final order the court declared: "It appearing to said court that the said Minute Order [of dismissal] was the result of, and due entirely to, (1) the inadvertence, mistake and excusable neglect of plaintiff and his counsel with reference particularly to the submission of the matter of the original motion and the filing of additional affidavits in connection therewith, all as more particularly appears in the affidavit of said plaintiff and said counsel and others on file herein, all of which is, in the opinion of the court, entirely excusable, and the court so finds; and (2) the court may have inadvertently submitted and decided said motion before plaintiff has an opportunity to file additional affidavits, contrary to the understanding of said counsel and plaintiff; and it now appearing that an injustice would be done said plaintiff if the said Minute Order is allowed to stand, and that the interests of justice would be subserved by a vacation of said Minute Order, and the court believing that it should, in the exercise of its inherent and implied powers vacate said Order, and good cause otherwise appearing therefor: It is hereby ordered, adjudged and decreed that the said Minute Order be, and the same is hereby, recalled, vacated and annulled for all intents and purposes as if the same had never been made, and the original motion of defendant to dismiss said cause is hereby set for hearing for January 23, 1933."

[1-4] It is well settled that the authority to grant relief under section 473 of the Code of Civil Procedure rests in the sound discretion of the trial court; that its decision will not be disturbed in the absence of a clear showing of an abuse in the exercise of such discretion (14 Cal. Jur. 1072); and that the burden is upon the appellant to show as a matter of law that such discretion has been abused. Kalson v. Percival, 217 Cal. 568, 20 P.(2d) 330. Furthermore, it has been the fixed policy of the law always to allow a controversy to be tried and determined on its merits (Kalson v. Percival, supra); and to that end the appellate tribunals are disposed to affirm an order to that effect (Waybright v. Anderson, 200 Cal. 374, 253 P. 148), and in determining an appeal from such an order will resolve any doubts in favor of the applicant for such relief. Waite v. Southern Pacific Co., 192 Cal. 467, 221 P. 204; Gorman v. California Transit Co., 199 Cal. 246, 248 P. 923; Brill v. Fox, 211 Cal. 739, 297 P. 25. Moreover, it is well settled that independent of statutory provisions a trial court has the inherent power on its own motion to correct mistakes in its proceedings and within a reasonable time to annul its orders and judgments inadvertently made. Robson v. Superior Court, 171 Cal. 588, 154 P. 8; Harris v. Minnesota Investment Co., 89 Cal. App. 396, 265 P. 306; Consolidated Construction Co. v. Pacific Electric R. Co., 184 Cal. 244, 193 P. 238. As said in Freeman on Judgments (vol. 1, p. 432), such inadvertent or improvident acts are a species of irregularity and are exceptions to the general rule as to erroneous judgments.

[5] Applying the foregoing legal rules to the situation here presented, we are not prepared to hold that in annulling the order of dismissal and restoring the motion therefor for further hearing and determination the trial court transcended or abused the discretionary power conferred upon it by said section 473.

[6] Defendant makes the contention that in any event plaintiff's failure under the circumstances stated by him in his affidavits to procure and file the additional counteraffidavits within a period of one month following the hearing on October 17, 1932, amounted to inexcusable neglect as a matter of law, and that therefore it was beyond the discretionary power of the trial court to relieve him therefrom. We find no merit in the contention. As will be observed, the relief was granted upon the ground that there had been a misunderstanding as to the entry of the order for the submission of the motion to dismiss which resulted in depriving plaintiff of the opportunity to present all of his evidence in opposition to said motion; and consequently the question of the reasonableness of the delay in procuring said additional affidavits was not important; but even assuming that it was an important factor, an issue of fact was presented thereby upon which the trial court's determination in the light of all the existing circumstances and in the exercise of sound discretion is doubtless binding. Nor are we able to agree that the technical analysis to which defendant has subjected the averments of plaintiff's supporting affidavits prove that said affidavits are insufficient as matter of law to justify the granting of any relief thereon. The remaining points urged for reversal are incidental merely to those already discussed, and therefore are likewise without merit.

The order appealed from is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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2 Cal.App.2d 468

MESERVE et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

HOLLYWOOD CLEANING & PRESSING CO. v. SAME.

Civ. 9807, 9808.

District Court of Appeal, Second District, Division 2, California.

Nov. 28, 1934.

Hearing Denied by Supreme Court Jan. 25, 1935.

1. **Prohibition 🔑6(2)**

Sheriff, in levying execution, noticing and holding sale thereunder, acts in ministerial capacity only, and writ of prohibition does not lie to arrest such administrative action (Code Civ. Proc. § 1102).

2. **Prohibition 🔑6(2)**

Sheriff, when execution comes into his hands, has duty to serve it, and officer will not be prohibited from performance of his duty.

3. Execution ⚷47

Cause of action for damages for breach of contract *held* subject to be sold under execution taken out by defendant to satisfy costs on appeal, where judgment in favor of plaintiff on such cause of action was reversed and retrial ordered on question of damages only (Civ. Code, § 953; Code Civ. Proc. §§ 17 (3), 542(6), 688, and § 691, as amended by St. 1933, p. 1888, § 136).

4. Prohibition ⚷11

Superior court, if obtaining jurisdiction by motions to stay further proceedings under execution to satisfy costs on appeal, and to recall and quash execution, had power to decide question of law whether cause of action involved was subject to execution, even though it decided contrary to petitioners' contentions, and even though erroneous decision be made, as basis for denial of writs of prohibition (Code Civ. Proc. § 1102).

5. Prohibition ⚷11

Superior court, if obtaining jurisdiction by motions to stay further proceedings under execution to satisfy costs on appeal, and to recall and quash execution, had power to decide such motions, even though its decision was wrong, as basis for denial of writs of prohibition (Code Civ. Proc. § 1102).

6. Prohibition ⚷3(3)

Where superior court acquired jurisdiction by motions to stay further proceedings under execution to satisfy appellate court costs, and to recall and quash execution, appeals would lie from orders denying such motions, as upon special orders after final judgment, as basis for denial of writs of prohibition restraining further proceedings under execution (Code Civ. Proc. § 949).

7. Costs ⚷279

Superior court is without authority to stay proceedings under execution issued to satisfy costs on appeal as awarded by appellate court upon reversal of judgment.

8. Costs ⚷97

Costs on appeal incurred prior to assignment of interest in cause of action by plaintiff to its attorneys cannot be awarded against assignees, and assignees could not be held liable for costs expended prior to such assignment (Code Civ. Proc. §§ 385, 1026).

9. Assignments ⚷58

Assignment by plaintiff, pending appeal from favorable judgment on cause of action, of part of judgment as attorneys' fee in trial and appellate courts, if carrying any right to cause of action, *held* to amount to splitting of cause of action, and would be void as against defendant without its consent, leaving entire cause of action subject to execution in favor of defendant to satisfy costs awarded upon reversal of judgment.

◆

Separate original proceedings by Edwin A. Meserve and others, and by the Hollywood Cleaning & Pressing Company, for writs of prohibition prayed to be directed to the Superior Court in and for the County of Los Angeles and others.

General demurrer to the first petition overruled, and peremptory writ of prohibition issued in accordance with opinion, and general demurrer to the second petition sustained, and the petition dismissed.

Meserve, Mumper, Hughes & Robertson and J. D. Taggart, all of Los Angeles, for petitioners.

O'Melveny, Tuller & Myers, Pierce Works, and Jackson W. Chance, all of Los Angeles, for respondents.

ARCHBALD, Justice pro tem.

October 3, 1929, petitioner Hollywood Cleaning & Pressing Company (hereinafter called cleaning company) recovered a judgment in the superior court in and for Los Angeles county against respondent Hollywood Laundry Service, Incorporated (hereinafter called laundry company), for the sum of $43,865 as damages for the alleged breach of a contract made and entered into by said corporation. The cleaning company was represented in said action by petitioner Meserve, Mumper, Hughes & Robertson and one Harry W. Hanson, since deceased (hereinafter called attorneys). Said judgment was appealed by the laundry company and was reversed by the Supreme Court and a retrial ordered as to the issue of damages only (Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, 217 Cal. 124, 17 P.(2d) 709; Id., 217 Cal. 131, 17 P.(2d) 712), and costs on appeal in the sum of $2,549 were awarded said appellant.

Pending said appeal the cleaning company assigned to its said attorneys an unnamed portion of 40 per cent. of said judgment as "attorneys' fee in the trial and appellate courts." Said assignment "was not obtained nor agreed to until the 8th day of April, 1930, which was long after the defendant and appellant had prosecuted its appeal, to-wit, December 2, 1929, and long after defendant had incurred substantially all of the costs on appeal." No motion to retax said costs having been made within the time allowed therefor, the laundry company caused an execution to be issued for said costs against both the cleaning company and its attorneys as such assignees, and thereafter said cleaning company and its attorneys "were severally served by respondent E. W. Biscailuz, sheriff of said county, with said writ of execution and levies and notice of levy and seizure of all their right, title and interest in and to the cause of action" on which the complaint was filed. Said execution directed said sheriff to satisfy the same "out of the personal property of said Hollywood Cleaning & Pressing Co., a corporation, and of said assignee or assignees hereinabove named, and each of them; or if sufficient thereof cannot be found, then out of the real property belonging to said corporation and its said assignee or assignees on the 6th day of March, 1933, or at any time thereafter." Said cleaning company, in its own behalf, moved to stay further proceedings under said execution until judgment has been rendered on its said complaint, and to quash said execution to the extent that it attempts to levy upon its unliquidated cause of action; and said petitioning attorneys moved for an order recalling and quashing said execution on the ground that it was unlawfully issued as to them. Pending the hearing of such motion an order was issued by respondent court staying further proceedings under said execution pending the hearing of said motions, and requiring cause to be shown why said laundry company and said sheriff should not be enjoined and restrained from levying on any property of said attorneys, and particularly from attempting to sell said cleaning company's cause of action. On the hearing of said motions the judge announced that he would make an order denying them and permitting and directing said sheriff to execute said writ. Said attorneys filed their application herein for an alternative writ of prohibition, which was issued, directing said superior court, said laundry company, and said sheriff to show cause why they should not be restrained from proceeding further under said execution; and said cleaning company applied for a similar writ, which was also issued, prohibiting said superior court from making the order hereinbefore referred to and restraining respondents from selling or attempting to sell said cause of action, both of said writs requiring cause to be shown why said restraints should not be made permanent. As a return to such writs the respondents filed a general demurrer to each petition, which admitted the facts hereinbefore stated as well as some others not deemed material here.

[1, 2] It is evident that, so far as the sheriff is concerned in levying the execution, noticing and holding a sale thereunder, he is acting in a ministerial capacity only; and the writ of prohibition lies only to arrest the proceeding of a tribunal, corporation, board, or person *exercising judicial functions*, when such proceedings are without or in excess of the jurisdiction possessed. Code Civ. Proc., § 1102. "When process comes to the hands of a ministerial officer for service according to law, the duty devolves upon him to serve it, and he must do so at his risk. If the process be voidable or void, or if the acts of the officer under it are illegal, the law provides ample and adequate remedies for redress, to which resort must be had; but the officer himself will not be prohibited from the performance of his duty." Hobart v. Tillson, 66 Cal. 210, 212, 5 P. 83, 84.

[3] Petitioners urge that the cause of action of the cleaning company cannot be sold under execution and, impliedly, that the court below has no jurisdiction to act on the motions made otherwise than to grant them; and it is to prevent impending denial of its motions that the proceedings here pending were instituted. Is petitioner cleaning company's cause of action against the laundry company for damages for alleged breach of contract subject to sale under said execution?

Section 688 of the Code of Civil Procedure, so far as necessary here, provides: "All goods, chattels, money, and *other property, both real and personal, or any interest therein*, of the judgment debtor, not exempt by law * * * are liable to execution; * * * debts and credits, and all other property, both real and personal, * * * *and all other property not capable of manual delivery*, may be levied upon or released from levy in like manner as like property may be attached or released from attachment." (Italics ours.) Subdivision 3 of section 17 of the same Code provides: "The words 'personal property' include money, goods, chattels, *things in action*, and evidences of debt." "A thing in action is a *right to recover money* or other personal property *by a judicial proceeding*." (Italics ours.) Civ. Code, § 953. Section 691 of the Code of Civil Procedure (as amended by St. 1933, p. 1888, § 130), with reference to writs of execution, so far as material, reads: "The officer to whom the writ is directed, must execute the writ against the property of the judgment debtor, by levying on a sufficient amount of property, if there be sufficient; *collecting or selling the things in action* * * * and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment." (Italics ours.)

It would seem to be clear from the foregoing sections that the cleaning company's right to recover damages for the alleged breach of contract is personal property; and it is equally clear that it is not exempt from execution, and that it is not capable of manual delivery. It would therefore seem to be subject to sale under execution if like property may be attached or released from attachment.

Subdivision 6 of section 542 of the Code of Civil Procedure, so far as material here, provides: "Debts and credits *and other personal property, not capable of manual delivery*, must be attached by leaving with the person * * * having * * * under his control, such * * * *other personal property* * * * a copy of the writ, and a notice that the * * * other personal property in his possession, *or under his control* * * * are attached in pursuance of such writ." (Italics ours.) The words "debts and credits," as used in such section, would seem to have no application to a cause of action for damages for the alleged breach of contract. Nor can it be said that such a cause of action is "in the possession" of a plaintiff. It would, however, as we have said, seem to be "other personal property, not capable of manual delivery" and "under the control" of the plaintiff in the action. Being founded upon a contract, it survives (Probate Code, § 573), and it may be assigned by him.

Our Supreme Court has quoted with approval on at least two occasions the following language from the old case of Meech v. Stoner, 19 N. Y. 26: "Assignability of things in action is now the rule; non-assignability, the exception. And this exception is confined to wrongs done to the person, the reputation, or the feelings of the injured party, and to contracts of a purely personal nature, like promises of marriage." Rued v. Cooper, 109 Cal. 682, 693, 34 P. 98; Wikstrom v. Yolo Fliers Club, 206 Cal. 461, 464, 274 P. 959. In our opinion the Code clearly covers such a cause of action as is involved here. Identical Codes have been given a similar construction in other states. Johnson v. Dahlquist, 130 Wash. 29, 225 P. 817; State ex rel. Coffey v. District Court, 74 Mont. 355, 240 P. 667. See, also, Brenton Bros. v. Dorr, 213 Iowa, 725, 239 N. W. 808.

[4] Assuming that the trial court obtained jurisdiction of the parties and subject-matter by the motions of petitioners, we are of the opinion that it had the power to decide the question of law involved, even though it decided it contrary to petitioners' contentions, and even though an erroneous decision be made. In the case of Western Union Telegraph Co. v. Superior Court, 15 Cal. App. 679, 115 P. 1091, 1100, an attempt was made to prohibit the superior court from hearing an application by a foreign corporation to condemn private property for a public use upon the ground that the court had no jurisdiction to entertain an application by such a party. The District Court of Appeal discharged the alternative writ issued, and a petition to have the cause heard in the Supreme Court was denied therein (15 Cal. App. 701, 115 P. 1091, 1100) "upon the sole ground that in our opinion the remedy by prohibition is not available to the petitioner." The Supreme Court made the following very significant statement, which seems to be applicable here: "It is true that the capacity of a foreign corporation to exercise the power of eminent domain in this state is purely a question of law, but it is a question as much within the jurisdiction of the superior court as other questions of law arising in similar cases which are held to be reviewable here only on appeal." Assuming that the Superior Court here had jurisdiction to entertain the motions which petitioners made, and assuming that its action in deciding such motions (so far as the sale of the cause of action is concerned) would be determined by the construction such court placed upon the Code sections involved, it will be seen that here, as in the cited case, a question of law alone is involved. The Supreme Court there refused to interfere with the decision by the superior court of such question of law, holding that it was reviewable only on appeal. In our opinion the same principle is involved here.

[5, 6] If the superior court had jurisdiction to decide the motions in favor of petitioners, it would seem that it also has jurisdiction to decide such motions against them; or, in other words, it has the power to decide such motions even if its decision is wrong. Raine v. Lawlor, 1 Cal. App. 483, 82 P. 688. Again assuming that the superior court had jurisdiction to entertain the motions made by petitioners, in our opinion appeals would lie from the orders denying said motions, as upon special orders after final judgment; and, if the appeal did not act as a stay under section 949, Code of Civil Procedure, still it would be plain, speedy, and adequate, in view of the power of the appellate court to issue a supersedeas. Glougie v. Superior Court, 169 Cal. 675, 147 P. 972.

[7] It may well be questioned if the superior court has authority to stay proceedings on an execution issued for the costs of an appellate court. In the case of Mayor v. Buchanan, 3 Cal. 212, such a stay was made. The court there held that in such a case the clerk of the

court "acts, not by the authority of the District Court, but of this court. Neither the District Court nor the District Judge have any authority to prevent the immediate execution of the judgment of this court. So far as the appeal is concerned and the costs consequent thereon, the judgment of this court is final." In the case of First National Bank v. Stansbury, 214 Cal. 190, 5 P.(2d) 11, 12, the Supreme Court reversed an order issued by the superior court which attempted to stay the proceedings on a prior judgment for costs pending the determination of an appeal from a later judgment on the merits. The stay order was conditioned on the giving of a bond to secure such damages as might result from the making of the order. It may be implied from the opinion (though not involved in the appeal) that, if the order had required a bond to satisfy the judgment, it might have been sustained. The facts admitted by the demurrer here, however, do not mention a bond of any kind. The Supreme Court there said: "There is no interdependence between the judgment for costs of the former appeal and any judgment which may subsequently be entered in the main case."

In view of the foregoing we must conclude that said cause of action is subject to sale under execution in favor of the laundry company, and that the superior court has no authority to stay proceedings thereon.

[8] Was the execution unlawfully issued as to petitioning attorneys? The execution recites the assignment to such attorneys of an interest in the judgment appealed from, and directs the sheriff to satisfy the judgment for costs on appeal out of the property of the cleaning company "and of said assignee or assignees," etc. Respondents urge that it was properly issued, inasmuch as the assignment of a judgment carries with it the cause of action sued on; and as, under section 385 of the Code of Civil Procedure, an assignee may continue the action in the name of the original party, such assignee becomes "a person expressly authorized by statute" to prosecute an action, and in consequence costs may be recovered against such assignee or assignees as against a person prosecuting or defending in his own right, under section 1026 of the Code of Civil Procedure. Assuming, without so deciding, that under the assignment here it was intended to transfer an interest in the cause of action, and that from the date of the assignment such petitioners had a real interest in prosecuting the appeal and would become liable for costs incurred thereafter by appellant in prosecuting its appeal, still we do not believe that such assignee could be held liable for costs expended prior to such assignment. One of the facts admitted by the demurrer to the petition of said attorneys is that "said assignment was not obtained nor agreed to until the 8th day of April, 1930, which was long after defendant and appellant had prosecuted its appeal, to-wit, December 2, 1929, and long after defendant had incurred substantially all of the costs on appeal." In our opinion costs incurred prior to the assignment cannot be awarded against the assignee. In the case of Whitten v. Dabney, 171 Cal. 621, 632, 154 P. 312, it was held that the discretionary power of the court in the matter of costs did not extend to awarding costs against an intervener arising prior to his connection with the case. Until then he is not prosecuting or defending the action. We think the same principle applies here.

[9] In our opinion, however, it is not necessary to recall or quash said execution. An order issued by the superior court restraining the sheriff from levying on any property of the petitioning attorneys except the interest, if any, they may have in said cause of action, would preserve the right of respondent laundry company to an immediate enforcement of its judgment for costs, and yet protect the petitioning attorneys from any possible wrongful use of such execution. If such assignment of judgment carried any right to the cause of action, it amounted to a splitting of the cause of action, and, in our opinion, is void as against respondent laundry company without its consent; and such restraint would leave, as it should, the cause of action subject to an execution against the cleaning company.

In case No. 9808, the demurrer to the petition is sustained and the petition dismissed. In case No. 9807, the demurrer is overruled, and a peremptory writ will issue prohibiting respondent court from making an order which will permit the sheriff to levy said execution on any property of petitioners other than on any interest they or either of them may have, if any, in the cause of action upon which said execution is levied.

We concur: STEPHENS, P. J.; CRAIL, J.

2 Cal.App.2d 506

KRAEMER v. COWARD et al.

Civ. 9195.

District Court of Appeal, First District, Division 1, California.

Nov. 30, 1934.

Hearing Denied by Supreme Court Jan. 28, 1935.

1. Corporations ⚿657(3)

Notes and trust deed on California property mailed to Michigan corporation for acceptance and negotiation were executed in Michigan and enforceable by such corporation where agent conducting transaction was shown to be agent of makers and to be conducting all negotiations at their request.

2. Usury ⚿34

Notes calling for legal rate of interest over full period of loan were not usurious although rate for first two years was in excess of legal rate and although proceedings to sell property under trust deed were commenced within that time, it being within power of parties to contract with respect to interest payments within limits imposed by maximum legal rate.

3. Usury ⚿2(5)

Where, by terms of trust deed, executed by California residents and held by Michigan corporation as security for notes negotiated by corporation, payment was to be made in either state, and borrowers actually made payments in California, place of performance in absence of any other selection by depository was California and legal rate of interest was 12 per cent. per annum as provided by statutes of California.

4. Mortgages ⚿343

Sale conducted under trust deed by attorney for trustee *held* valid in absence of proof that sale was not legally authorized by trustee, subsequent execution of deed by trustee being sufficient confirmation of sale.

5. Mortgages ⚿372(4)

Purchaser of property at sale under trust deed *held* "owner" and entitled to maintain action for possession against original owners and signers of deed where sale was fairly made in accordance with law and without fraud.

[Ed. Note.—For other definitions of "Owner," see Words & Phrases.]

◆

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by E. F. Kraemer against Joseph Coward and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Clark, Nichols & Eltse, of Berkeley, for appellants.

John Ralph Wilson and Carl E. Day, both of San Francisco, for respondent.

JOHNSTON, Justice pro tem.

An action was brought in the superior court of the state of California in and for the county of Alameda wherein E. F. Kraemer was plaintiff and Joseph Coward, Elizabeth Coward, his wife, and Mrs. L. M. Moore were defendants, the purpose of said action being to recover possession of certain premises in Oakland under the provisions of section 1161a, Code of Civil Procedure. Judgment was had by the plaintiff, from which judgment defendants have appealed.

The facts, briefly stated, are as follows: Defendants Joseph Coward and his wife, Elizabeth Coward, were desirous of negotiating a loan upon certain properties belonging to them in Alameda county, Cal., and applied to the Guaranty Mortgage Company of California, a California corporation, for a loan, which said company was at all times the agent of Coward and his wife in securing said loan. The Guaranty Mortgage Company secured the loan through one Howard C. Wade, who maintained an office at Los Angeles, Cal. Thereafter Coward and his wife executed a promissory note designated herein as the "principal note" for $29,000 bearing interest at 6 per cent. per annum and a noninterest bearing note for $3,564.39 called the "subordinate note." Both notes called for monthly payments. At the same time a deed of trust was executed, signed by the Cowards, running to one Howard C. Wade, as trustee. The notes were payable to said Howard C. Wade, as trustee, no beneficiary being named therein. The notes and deed of trust, together with a draft for $29,000, were sent to Detroit, Mich., and were there approved and accepted by the United States Mortgage Bond Company, a Michigan corporation, and upon such acceptance the said United States Mortgage Bond Company honored the draft for $29,000 and sent the same to California, payable to the order of Coward and his wife. Both notes called for monthly payments. It is plainly apparent that the subordinate note was in reality for interest in addition to the interest payable on the principal note. Defendants Coward defaulted in the interest payments on the principal note and in the principal payments on the subordinate note. Thereafter the holder of the notes and deed of trust filed notice of breach, claiming that defendants defaulted by reason of their failure to pay interest. Defendant Moore is a tenant of the defendants Coward. Further facts will appear in the opinion hereafter.

The defendants have set up various defenses:

(1) That the owner of the notes is a foreign corporation, not qualified to do business in this state, and that the whole or a portion of the transactions connected with this matter having been transacted in this state, are therefore unenforceable; (2) that the rate of interest of said loan was usurious; (3) that the sale was illegal because conducted by the attorney for the holder of the notes; (4) that the plaintiff was not the owner of the property and hence had no right to bring this action in unlawful detainer.

I. While the record is not as clear as it might be, it is fairly apparent that the lender of the money and the real holder of the notes was the United States Mortgage Bond Company, a Michigan corporation. It is conceded that this mortgage bond company was not qualified to do business in California. As before stated, it would appear that the loan was made in the following manner: The Cowards, appellants, applied to the Guaranty Mortgage Company of California, a California corporation, for a loan. Either this corporation could not or did not desire to make the loan and apparently entered into negotiations with other people to obtain the loan. In doing so, it must be and is conceded that this company was at all times acting as the agent of the Cowards. The notes and deed of trust were signed and acknowledged in California on property situated in Oakland, Cal., and sent to Detroit, Mich., with draft attached. At Detroit, Mich., the notes and deed of trust were accepted by the United States Mortgage Bond Company, the draft was honored, and the money forwarded to California Pacific Title & Trust Company, at California, an agent of appellants Coward, where it was paid to the Cowards.

There are numerous cases holding that where a deposit is made by one party in the mail, of an instrument properly addressed to the other party, that the delivery is made at the residence of the person where it is intended to be received. However, if the acceptance is at the place of ultimate delivery, the person accepting, if not a party to the original contract, would not be construed as being a principal and having power over the agency of delivery. In the instant case the United States Mortgage Bond Company was not a party to the loan, but made the loan upon receipt at Detroit of the notes and deed of trust which had been formerly executed to Howard C. Wade, as trustee. There is no evidence to the effect that they had anything to do with the execution of said notes and trust deed, but that upon their delivery in Detroit, they accepted the notes and honored the draft. So far as the record shows, it appears to the court they were absolute strangers to the transaction up to the time that the notes and deed of trust were presented to them in Detroit. It would therefore appear to the court that the United States Mortgage Bond Company did not enter into the transaction at any other time and place, save and except that they accepted said notes and deed of trust at Detroit, Mich., with the then understanding that the holder of said notes and trust deed would accept payment at either a place in Los Angeles or a place in Detroit, subject, however, to the right of the holder of the notes to designate a different place of payment. At all times the payers, Cowards, appellants, had a right to pay at Los Angeles, until a different place of payment was designated. It does not appear from the evidence that any different place of payment was ever designated. We consider the question of place of payment solely for the purpose of determining the question of whether the loan was usurious.

[1] It is the opinion of the court that the contract was executed in Michigan. We would call attention to the fact that the Supreme Court of this state in Navajo County Bank v. Dolson, 163 Cal. 485, 490, 126 P. 153, 41 L. R. A. (N. S.) 787, has held that unless the agent of a party deposits a document in the mails addressed to the other party, the addressee does not receive the document for acceptance and negotiation at the place deposited, unless the depositor is the agent of the addressee. In the instant case the depositor was appellants', Cowards', agent and prepared and addressed and sent said documents at the request of appellants, Cowards. At no time has there been shown to be any evidence showing that the depositor in California was the agent of any persons in Detroit, Mich.

From the foregoing, we cannot find that United States Mortgage Bond Company was doing business in California as such term is defined in our statutes.

[2, 3] II. The next point raised by appellants is that the loan was usurious because of a claim that the interest thereon was in excess of 7 per cent. per annum. In deciding this question, we must consider as to where

the interest was to be paid. The legality of rate of interest is governed either by the law in existence at the time and place of the execution of the contract, or of its performance. The laws of Michigan, the place of contract, provide one rate of interest, the laws of California provide a different rate. The laws of California permit the collection of interest where agreed upon between the parties where such rate does not exceed 12 per cent. per annum.

Under the contract made with Howard C. Wade the place of payment is fixed at Los Angeles, Cal., or Detroit, Mich., or at such other depository as the holder of the notes may select. It does not appear that any selection other than Los Angeles, Cal., or Detroit, Mich., was ever designated by the depository. The borrowers, Cowards, made payments at Los Angeles, Cal., and these payments were receipted for by the trustee or his agent. No other designation of place of payment having been made, we would be compelled to hold that the place of payment, and therefore performance, was, in so far as the borrower is concerned, at Los Angeles, Cal., and that the legal rate is 12 per cent. per annum.

Appellants, however, contend that even though the California law governs, nevertheless the loan is usurious because the payments of interest for the first two years exceed 12 per cent. per annum, and furthermore that since proceedings to sell under the deed of trust were commenced within that period, that this fact constituted the loan usurious.

These matters are treated rather fully in Sharp v. Mortgage Security Corporation, 215 Cal. 287, 9 P.(2d) 819, 820, and the Supreme Court in that case, referring to a former decision of theirs, Haines v. Commercial Mortgage Co., 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A. L. R. 725, has said: "We intended to hold that the maximum rate allowed for loans coming under the act is at the rate of 12 per cent. per annum *for the full period of the loan,* and that within such limit the parties may freely contract in respect thereto, if done in writing" (italics ours), and then stated that while their decision was subject to the observation that it was dictum, yet they based it upon the weight of authority and what was deemed to be only just, and again, in the same decision, the court has stated: "It is also elementary that the contract must in its inception require a payment of usury or it will not be held a violation of the statute and it may not be judged after some default of the borrower, which default alone authorizes penalties or forfeitures which, if exacted in the beginning, would have been a violation of the statute." Various decisions are then cited and the court further states: "The cases above cited are also authority for the proposition that a debtor cannot bring his creditor to the penalties of the usury law by his voluntary default in respect to the obligation involved, where no violation of law is present at the inception of the contract." For the full period of the loan the interest does not amount to 12 per cent. per annum and the loan is therefore not usurious.

In the same decision the court calls attention to the fact that appellants had not placed themselves in a position where they might rely upon the fact that the lender had attempted to accelerate the maturity date of the obligations in order to collect the principal sum and interest accrued up to the time of the default and interest for the entire period of forbearance because of the fact that they had not pleaded that prior to the institution of the action they had tendered to plaintiff the correct amount due upon the obligation and that such tender when made was refused and that this was an elementary requirement before relief of the character sought could be had.

[4] III. Appellants contend that the sale was illegal because conducted by the attorney for the holder of the notes. This contention has been sufficiently disposed of in the recent case of Orloff v. Pece, 134 Cal. App. 434, 25 P. (2d) 484, in which this court has held: "To decide this point we need only hold, which we do, that without regard to the section cited [2924a, Civ. Code] a trustee may employ an agent to do the ministerial act of auctioning the property," and in the same case decided that whereas there was nothing to indicate that the attorney did more than this, and whereas the trustee named in the deed of trust has not claimed to have done less than its provisions required, nor is it asserted that he performed any acts other than were provided for in the deed of trust, he had power to sell through another person.

There is no proof to the effect that the auctioneer in this case, Butler, who conducted the sale, was not legally authorized by trustee Howard C. Wade to sell the property, and did sell it under the terms and provisions as set forth in the deed of trust. The ratification of the trustee subsequently, by executing the deed, sufficiently confirms the sale. Therefore we must decide adversely to appellants upon that question.

[5] IV. With reference to the question, "Is Kraemer the owner of the property?" appel-

lants claim that plaintiff was not the owner of the property. The sale seems to have been fairly made. No fraud appears to have been perpetrated upon the appellants. The sale seemed to have been made under the laws of this state as provided herein. The borrowers, Joseph Coward and Elizabeth Coward, signed and executed the notes and deed of trust. They received the money and defaulted in their payments. They could not expect to retain the profits from the loan transaction and likewise retain the property. They have never offered to return the moneys they have received and in the judgment of the court cannot be heard to complain.

As before stated, there are numerous decisions to the effect that "he who seeks equity, must do equity." The record title to the property was in the plaintiff Kraemer and even though he might have been holding title as a trustee for some other person, nevertheless, as record title owner, he was sufficiently the owner, entitled to the possession to maintain the action.

No other questions raised by appellants are sufficiently important to require consideration.

For the foregoing reasons, the judgment must be affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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2 Cal.App.2d 671

WALLER v. WALLER.

Civ. 5255.

District Court of Appeal, Third District, California.
Dec. 7, 1934.

Deeds 🔑212

Evidence *held* not to justify setting aside of deed on ground that deed to husband and wife as joint tenants was made in consideration of wife's promise to return and live with husband and that wife failed to keep her promise.

Appeal from Superior Court, City and County of Los Angeles; J. O. Moncur, Judge.

Action by Thomas F. Waller against Josephine Waller. From a judgment for plaintiff, defendant appeals.

Reversed.

H. E. Gleason, of Los Angeles, for appellant.

George H. Gobar, of Fullerton, for respondent.

Mr. Justice PLUMMER delivered the opinion of the Court.

This action was brought by the plaintiff for the purpose of having set aside a certain deed executed by the South Coast Land Company to the plaintiff Thomas F. Waller and the defendant Josephine Waller, his wife, as joint tenants. The plaintiff had judgment, and from this judgment the defendant appeals.

The relief granted to the plaintiff appears to have been awarded on the theory that the deed was made in consideration of the appellant promising to return and live with the plaintiff as his wife, and that she failed to keep such promise. The deed in question was made in November, 1928. This action was begun in January, 1931. The appellant demurred to the plaintiff's complaint; raised, among other questions, that of laches; and also that the complaint does not state facts sufficient to constitute a cause of action. Objection is also made that the findings are not supported by the evidence.

As a setting out of the testimony, which will hereafter be done, shows very clearly that the findings are not supported, we do not need to give any consideration to the insufficiency of the complaint, or the question of laches on the part of the plaintiff in allowing over two years to elapse after the execution of the deed before the institution of this action.

The complaint alleges, and the court found, that prior to the execution of the deed involved herein the plaintiff had a contract for purchasing certain lands lying in the county of San Diego, giving a particular description thereof. Following the allegations of the complaint, the court made, among others, the following findings:

"IV. It is true that following the marriage of the plaintiff, Thomas F. Waller, and the defendant, Josephine Waller, said defendant repeatedly begged, pleaded and requested that plaintiff transfer to her an interest in the above described real property, and that the defendant, Josephine Waller, on more than one occasion and on occasions too numerous to mention, stated to plaintiff, over a period of time from the marriage of plaintiff and defendant up to and including the 10th day of September, 1928, that she would like to have the real property of plaintiff stand in her name and that of plaintiff as joint tenants with the right of survivorship so it would go to her if he died. It is true that on or about November 16, 1928, Josephine Waller, having no intention to perform said promise, stated to plaintiff that she would return to live with plaintiff if he would have the deed to the real property, which he was obtaining at the time, made out to her and him as joint tenants with the right of survivorship.

"V. It is true that the defendant Josephine Waller, during the period of the time from July 14, 1928, up to and including the 10th day of September, 1928, professed to have great love and affection for plaintiff, who was a man of fifty years or thereabouts, and had been a bachelor prior to his marriage to her.

"It is true that plaintiff believing all of the above statements so made to him by the said defendant, Josephine Waller, and relying upon the said statements, and desiring to maintain the love and affection of said defendant, did, by a deed made and executed on the 16th day of November, 1928, have conveyed to the said defendant Josephine Waller, and himself as joint tenants with the right of survivorship, the said above described real property by defendant, South Coast Land Company, a corporation, from whom plaintiff was buying said property. It is true that the consideration for said deed to be paid to the said plaintiff by the said defendant Josephine Waller, was the carrying out of the promise to return to and live with plaintiff as his wife. It is true that said plaintiff has never received either the whole or any part of the said consideration since the time he had conveyed the said above described real property to the said defendant Josephine Waller, and himself as joint tenants with the right of survivorship, and said defendant Josephine Waller, has continually refused, and failed to return to, and live with plaintiff as his wife at all times since the making of said deed.

"VI. It is true that the said defendant Josephine Waller, at the time and coincident with the making of the above statements to said plaintiff, knew the same to be false and fraudulent in this, that she, the said defendant, did not desire to have an interest in this said above described real property deeded to her and the said plaintiff so that it would go to her if he died, but the said defendant, Josephine Waller, desired the said real property to stand partly in her name for her personal use and benefit and to use said interest in said property as a basis for an advantageous property settlement in her contemplated divorce action against plaintiff.

"It is true that the attitude, love and affection of the said defendant, Josephine Waller, changed shortly after the transfer to her for the said plaintiff of the interest in said above described real property, and from the 16th day of November, 1928, the conduct of the defendant, Josephine Waller, has been unbearable in so far as the plaintiff was concerned, in this, that the said defendant, Josephine Waller, repeatedly after obtaining the recording of said deed to the said interest in the above described real property from said plaintiff on December 7, 1928, in Book No. 1571, page 22 of deeds, records of San Diego County, California, told said plaintiff that 'since the above described real property was partly her own property, that he could pay her $2000.00 for her interest therein at $25.00 a month, interest at 8 per cent per annum on balance due, and $150.00 to her attorney,' in exchange for a quitclaim deed for her interest therein."

"XI. It is true that the above described property and the whole thereof was purchased from plaintiff's separate funds earned and accumulated by plaintiff during the period when plaintiff and defendant were unmarried and living apart. It is true that no part of the purchase price paid for said property and no investment made therein was from the separate property or funds of defendant Josephine Waller. It is true that said property was so acquired in the years prior to 1928, and deed to same was obtained in 1928, and the title to said property was then taken in the names of, and said property was then conveyed to plaintiff and defendant Josephine Waller as joint tenants with the right of survivorship upon, and because of the express promise of defendant Josephine Waller, who was then living separate and apart from plaintiff, to return to and live with plaintiff as his wife.

"It is true that said deed was ordered to be made to plaintiff and defendant Josephine Waller, as joint tenants with the right of survivorship also upon the suggestion of Elizabeth Keogh, a clerk in the office of defendant, South Coast Land Company, a corporation, grantor, made November 16, 1928, at the time plaintiff and defendant Josephine

Waller, called to order said deed, at which time said Elizabeth Keogh stated to plaintiff, 'I suppose you want this deed made to yourself and wife as joint tenants,' to which query plaintiff, being an uneducated man and otherwise ignorant of the effect of the inclusion of his wife's name on said deed, stated 'Yes', and plaintiff thereafter executed a written order in words and figures as follows:

"'November 16, 1928.

"'For and in consideration of the sum of Ten Dollars ($10.00) in hand paid, receipt of which is hereby acknowledged and for other valuable consideration, I, the undersigned, Thomas F. Waller do hereby assign all my right, title and interest in and to the within contract and all the land herein described to Thomas F. and Josephine Waller, husband and wife, joint tenants, together with the 5 shares of capital stock of the Oceanside Mutual Water Company.

"'[Signed] T. F. Waller
"'206½ N. Boulom Fullerton.
"'Witness (Signed) Elizabeth Keogh.'

"Relying upon which order defendant South Coast Land Company, a corporation, executed the deed to said land as aforesaid. It is true that said deed was so ordered by plaintiff with no intent whatsoever on the part of the plaintiff to make a gift of said property or any part thereof to defendant Josephine Waller, and in reliance upon defendant Josephine Waller's representation that she would keep her promise and would return to live with and be a wife to plaintiff. It is true that ever since the title was so conveyed, said property has been occupied by plaintiff up to November 1, 1930, as an avocado ranch and nursery, and that since said date, as the home of plaintiff alone, and that defendant, Josephine Waller, has never occupied said property in any manner, and said property was held and used as the separate property of plaintiff at all times and not otherwise."

That these findings are not supported by the evidence, as contended for by the appellant, we here set forth in full the testimony of the plaintiff, which is all the testimony bearing on the subject, to wit:

"Thomas F. Waller, the plaintiff in the above entitled action, having been called as a witness in his own behalf, testified as follows: My name is Thomas F. Waller. I live at Carlsbad, San Diego County, on the ranch involved in this particular lawsuit.

"Q. I show you a deed from the South Coast Land Company to Thomas F. Waller and Josephine Waller, husband and wife, as joint tenants, with rights of survivorship. I will ask you if you have seen that before. A. I saw something like that.

"Mr. Gobar: I wish to offer this deed in evidence as plaintiff's exhibit.

"The Court: It may go in as Plaintiff's Exhibit I.

"The said deed thus received in evidence was executed by the South Coast Land Company conveying to Thomas F. Waller and Josephine Waller, husband and wife, as joint tenants, the real property described in plaintiff's complaint in this action, dated November 16, 1928. Before I got this deed I was buying a property on a contract from the South Coast Land Company. About the time I got this deed, I think it was right about $1,100.00 I still owed on the place. At the time I got the deed I was married to Mrs. Waller. She was not living with me then. I borrowed $1,100.00 from the Building and Loan Company at Anaheim, California, to pay off the balance due on the contract so that I could get this deed. When I wanted to borrow this money from the company they required my wife to sign the papers, so I went to see her in regard to signing them. I saw her at her home here in Hollywood and I just said I wanted to borrow some money on the place to pay off my trust deed and some other debts and wanted her to sign the papers. She promised me that she would. I went and made arrangements to get the money and then went in after her to sign the papers. She wanted to back out and not go and sign them. I told her she ought not to do that way, tell me she was going to do something and then not do it and have me go to all that trouble. She said she would go down to see her lawyer and if it was all right for her to sign, she would sign them. She said her lawyer was Mr. Barnes, so we just got in the car and went on down to see Mr. Barnes and had a conversation with Mr. Barnes. Mr. Barnes said she could sign the papers, it would be all right for her to sign the papers if the papers were signed up like I said they were; something like that. I told her the deed was to be made in her name, too. She did not say anything about the deed being made out in her name.

"Q. Did she say she would do anything besides signing? A. Well, we just left there then I believe, if I remember right, and went on out and signed the papers, out to Anaheim.

"Q. You signed the papers at Anaheim. A. Yes. And then I think I brought her home. I do not remember that I had any conversation with her at this time. After I signed the note and trust deed I paid some money to the Land Company from whom I bought the land with the money that I borrowed. I had to sign to get the money before I could get the deed. I do not remember having had anything to say with regard to these papers or the property after I got the money on this loan. I got the loan for $2,200.00 and got $300.00 later. Both of them amounted to $2,500.00. She signed the papers on the second loan.

"Q. Now, was any conversation ever had between your wife and you after you had separated, about going back to live together again? A. Of course she promised this.

"Q. When was this? A. Just when we started to make it, to get the deed made out, and everything.

"Q. What did she say? A. Well, she just decided that she would go back and live with me.

"The Court: Is that what she said? A. Yes, sir, she said she was coming back and live with me, and I was going to have the deed made to I and her, and if she was going to be my wife, I wanted it to be hers, deed part of this to her; that's the way it was, if you want it.

"Q. This was at what time? A. Well, when we started in to get this deed made out.

"Q. Did she ever say anything along that line any other time? A. No, no, that was the first time, I believe, we thought anything about getting any deed and paying it out, you see.

"Q. Did she actually return and live with you? A. No, sir. Cross examination: The first conversation I ever had with Mrs. Waller about going back to live with me was when the deed was made out and the loan papers signed. Before I had that conversation I went to see the loan people about getting a loan. I arranged for the loan and then went to see her. The Company told me if I got the loan, Mrs. Waller would have to sign the papers and I went back to see if she would sign the papers with me. That was the reason I went back to see her, about signing the papers.

"Q. Now, after the deed was made out did you have any discussion with her about going back and living with her prior to about six months afterwards? A. Well, now, I cannot remember the dates, but she come out there and made the proposition about coming back and had me also hunt for a house and she would come back in three or four days; she said she would come back.

"Q. That was when she suggested coming back and living with you that the deed was made out? A. At one time, yes, sir.

"Q. That was about six months after the deed was made out, wasn't it? A. I could not tell you when it was. The loan of $2,200.00 which was afterwards raised to $2,500.00 never has been repaid. Mrs. Waller signed the note for the $300.00 additional loan. I am pretty sure she did or I would not have got it. Redirect examination. The witness testified further: I remember the time when I signed that direction to make the deed. It was at the time I got the deed. We were at the South Coast Land Company down there. Mrs. Waller was there and some of the office force of the Land Company. I remember now, I had my first talk with the man and he asked me how I wanted it made out, and then he explained it to me and told me how. I could not say just exactly, tell it just exactly like he told me, but he explained that if I had it made in both names that at my death she would have no trouble in keeping the property and no one come in and take it away from her. She was there at the time, and I says: 'Well, she is my wife, we will just have it all made out and have no more trouble about it.' They made out the deed that way and nothing more happened as near as I can remember of."

There is nothing in this testimony showing that the appellant repeatedly begged, pleaded, and requested that the plaintiff transfer to her an interest in the real property; nor does it appear from the testimony that the appellant, having no intention to perform, stated to the plaintiff that she would return and live with the plaintiff if he would deed the property to her. No conversation appears to have been had in relation to the deeding of the property until at the time of the execution of the deed and the execution of instruments to secure payment of the balance due on the property.

There is no evidence in the record in relation to the existence of any love or affection between the parties, or that there was any change in relation to that subject. There is no evidence in the testimony that the plaintiff relied upon or believed any statements alleged to have been made by the appellant in this action to induce him to have the deed made to her as one of the joint tenants; and there is no evidence to support the finding that the consideration for the deed was the carrying out of the promise on the part of the appellant to return and live with the plaintiff as his wife. The record shows that prior to the execution of the deed, the plaintiff had already made an assignment to the appellant of an interest in the contract, precisely the same as that contained in the deed of conveyance.

The record also shows the signing of promissory notes by the appellant. There is mention in the record that the plaintiff had executed some instrument to indemnify the appellant if she were called upon to pay any portion of the notes in question. The instrument, however, is not in the record.

We do not need to enter into any discussion of the legal principles involved, or review any of the cases cited by the appellant having to do with the cancellation of deeds obtained by fraudulent promises, as the testimony which we have set forth shows that the findings of the court are unsupported, as contended for by the appellant.

The judgment is reversed.

We concur: PULLEN, P. J.; THOMPSON, J.

PAULSEN v. McDUFFIE. *

Civ. 8894.

District Court of Appeal, First District, Division 1, California.

Nov. 27, 1934.

Rehearing Denied Dec. 27, 1934.
Hearing Granted by Supreme Court Jan. 25, 1935.

1. Seamen 🔑29(1, 4)

Seaman's contributory negligence does not bar recovery for injuries sustained, nor is employer's negligence conclusive on question of liability (Jones Act § 33 [46 USCA § 688]; Federal Employers' Liability Act § 1 [45 USCA § 51]).

2. Seamen 🔑29(4)

Employee who knows of defect in appliances used by him and appreciates resulting danger, but continues in employment without objection or without obtaining from employer assurance of reparation, assumes risk, notwithstanding it arises from employer's breach of duty and notwithstanding employee is not negligent (Jones Act § 33 [46 USCA § 688]; Federal Employers' Liability Act § 1 [45 USCA § 51]).

3. Seamen 🔑29(5)

Burden of proving that employee assumed risk rests upon employer (Jones Act § 33 [46 USCA § 688]; Federal Employers' Liability Act § 1 [45 USCA § 51]).

4. Seamen 🔑29(4)

Experienced seaman who, while acting as boatswain, was injured when, by increasing speed of winch drum, his blouse caught between strands of line or between line and drum, assumed risk, where seaman was aware of alleged defective condition of line and did not complain to officer, and seaman was not authorized to increase speed and was not directed to do so (Jones Act § 33 [46 USCA § 688]; Federal Employers' Liability Act § 1 [45 USCA § 51]).

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Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Axel Paulsen against William C. McDuffie, receiver of the Richfield Oil Company of California, a corporation. Judgment for plaintiff, and defendant appeals.

Reversed.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellant.

Ford & Johnson, of San Francisco, for respondent.

PER CURIAM.

An action to recover damages for personal injuries.

Plaintiff was a seaman employed by defendant in operating the ship Kehoshee, which was moored at a wharf in San Francisco. At the time of his injury he was acting as boatswain and assisting in heaving in or bringing on board from the dock one of the ship's mooring lines. This line was a manila rope from six to eight inches in circumference. The work was being done by means of a steam winch, which consisted of a revolving drum, which was referred to by the different witnesses as the "gypsy head," "nigger head," or "spool." While engaged in this work plaintiff's blouse, a loosely fitting shirt, caught either between the strands of the line or between the line and the drum, and he was injured. He claims that this was due to defendant's negligent method of maintaining the line, namely, that its strands were frayed and loose, and this, with the manner in which it was rigged, caused it to slip or, as he described it, surge on the revolving drum. He

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 47 P.2d 709.

was attempting to correct the latter difficulty when the accident occurred.

A jury returned a verdict in his favor.

The defendant, who has appealed from the judgment, entered thereon, contends that no negligence on his part was shown; that plaintiff assumed the risk of injury, and, further, that the trial court erred in certain of its instructions to the jury.

The seamen with whom plaintiff was working testified that the accident occurred about 10:30 o'clock at night. It was dark, but that there were lights on the ship's quarters and one or two lights on the dock alongside. One of the seamen testified that before they commenced to heave the line in the chief officer of the ship ordered him to place the same around what is called the bit, which is an upright stationary metal cylinder; that the proper method of heaving in the line was to place the same around the fair lead, which also was an upright metal cylinder the upper portion of which revolves; that the function of the fair lead is to control the incoming line so that it will pass directly in a straight line, i. e., at a right angle to the face of the drum of the winch, and that, if placed around the bit, it comes onto the drum at an oblique angle, under which condition it will slip. According to the chief officer the line was placed around the fair lead, while plaintiff himself testified that it was around neither the bit nor the fair lead, but came directly to the drum through a chock, which is an upright iron loop fastened to the edge of the deck and through which the line passes when being brought on board the ship. He further testified that he had nothing to do with the rigging of the line. When the above arrangement had been completed, the chief officer, as he testified, turned the throttle of the steam winch and the drum commenced to revolve. He stepped to the rail of the ship in order to observe the position of the line, and gave an order to heave in. To exert any pull on the line it was necessary to create sufficient friction between it and the revolving drum, and this was effected by the seaman working with plaintiff, who was pulling upon the rope and dropping it by his side as it came around and off the drum.

Concerning his part in the operation, plaintiff testified that he had gone to the forecastle to call the men, and that when he came on deck the winch was running, but not fast enough to heave in the line, which at that time was not coming in; that he stepped to the winch and opened the throttle wider, causing the drum to revolve more rapidly, and that not until this had been done did the line commence to come in. He also stated that he received no order to speed up the winch, and that it was not otherwise his duty to do so. The other seaman mentioned testified that the line was coming in slowly when plaintiff increased the speed in the manner stated. It appears without conflict that there was no slipping or surging of the line until the speed of the winch was increased. The surging commenced immediately thereafter, whereupon plaintiff, instead of stopping the winch or reducing its speed, attempted to straighten the line, placing his hands upon the rope about a foot from the drum, with his clothing in close proximity to the rope.

Plaintiff was an experienced seaman who had been employed as such on the ship for about three months, and had helped to heave in the mooring lines on numerous occasions.

As respects the condition of the rope, it was testified that it was old; that the strands in places were loose, "uncorded" as plaintiff described them. He also testified that this was also the case in places along its whole length, and that he had seen and known of this condition for some time previous to the accident. According to another witness the line was chafed in places with loose pieces hanging from it. It was also testified by the latter witness that he had previously called the attention of the ship's officer to the condition.

The action was based upon an Act of Congress known as the Jones Act, which provides in part: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. * * *" Seamen's Act, March 4, 1915, c. 153, § 20, 38 Stat. 1185, as amended by Jones Act, June 5, 1920, c. 250, § 33, 41 Stat. 1007, 46 USCA § 688. Under this act a seaman becomes entitled to the rights and remedies granted railway employees by the Federal Employers' Liability Act, which provides that every common carrier while engaged in commerce between any of the several states or territories, or between any of the states or territories and foreign nations, shall be liable to any person employed by such carrier in such commerce "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its * * * appliances, machinery, * * * works, boats, wharves, or other equipment." April 22, 1908, c. 149, § 1, 35 Stat. 65, 45 USCA § 51.

[1-3] The contributory negligence of an employee does not bar a recovery in such cases (Chicago, R. I. & P. R. Co. v. Ward, 252 U. S. 18, 40 S. Ct. 275, 64 L. Ed. 430), nor is the negligence of the employer conclusive on the question of the latter's liability. When an employee knows of a defect in the appliances used by him and appreciates the resulting danger, but continues in the employment without objection, or without obtaining from the employer an assurance of reparation, he assumes the risk even though it may arise from the employer's reach of duty, and such assumption of risk may be free from any suggestion of fault or negligence on the part of the employee. Seaboard, etc., Ry. v. Horton, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1. But if an employee was obeying an order to do a particular thing in the doing of which he was injured, he does not assume the risk unless the danger is so obvious and imminent that an ordinarily prudent person would refuse obedience. 39 Cor. Jur., Master and Servant, § 1115, p. 894; Fillippon v. Albion Vein Slate Co., 250 U. S. 76, 39 S. Ct. 435, 63 L. Ed. 853. It has also been held that the burden of proving that the employee assumed the risk rests upon the employer, Boin v. Spreckels Sugar Co., 155 Cal. 612, 102 P. 937; and, where the former was not familiar with the character or type of appliances he was using, and the risk from such use is not obvious or well known, there is no assumption of risk, Chamberlin v. Rylander (C. C. A.) 68 F.(2d) 362.

[4] In the case at bar the plaintiff was an experienced seaman who, as stated, had been employed on the ship for some months. It is clear that he was familiar with the appliances being used, and it is not claimed that he was ignorant of the dangers, if any, due to the way the line was rigged. Notwithstanding this he continued in the employment, making no objection or complaint to the officer. He admits that he was not authorized generally to increase the head of steam, or directed on this occasion to do so. When he later stepped to the drum and undertook to adjust the line in order to prevent it from slipping, its frayed condition and the looseness of its strands were obvious and, as he testified, he was aware of this condition. Nor is it claimed that the accident was in any way due to the fact that the work was being done at night. Furthermore, it is not contended that he was directed by the officer to attempt to remedy the defect in the manner he described, and it is undisputed that the proper course under the circumstances was to have stopped or reduced the speed of the winch. These facts bring the case within the rule that, where the defect and risk are obvious, and the servant continues the employment without objection or without assurance of reparation, he assumes the risk.

Defendant complains of several instructions given at plaintiff's request upon the doctrine of the duty of the employer to furnish the seaman with a reasonably safe place to work, negligence, the assumption of risk, and the presumption that plaintiff exercised ordinary care for his own safety. In view of our conclusion that the risk of injury was under the circumstances assumed by the plaintiff, and that for that reason there can be no recovery, it will be unnecessary to consider these objections.

The judgment is reversed.

* * *

CRANE et al. v. EAST SIDE CANAL & IRRIGATION CO. *

Civ. 4920.

District Court of Appeal, Third District, California.

Nov. 27, 1934.

Rehearing Granted Dec. 27, 1934.

1. Contracts 🔑313(2)

"Anticipatory breach of contract" occurs when one of parties repudiates contract by acts or statements indicating that he will not or cannot substantially perform essential terms, or by voluntarily transferring to third person property rights which are essential to substantial performance, or by voluntary act which renders substantial performance impossible or apparently impossible.

[Ed. Note.—For other definitions of "Anticipatory Breach," see Words & Phrases.]

2. Contracts 🔑313(2)

Conveyance of property without protecting interest secured by previous executory

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*For subsequent opinion see 44 P.2d 455.

contract with relation to property conveyed constitutes breach of previous contract which authorizes suit for damages on doctrine of anticipatory breach.

3. Waters and water courses ⚷263

Conveyance by irrigation company of water rights without protecting interest of plaintiff under contract to furnish plaintiff with water for irrigation purposes constituted anticipatory breach, where conveyance rendered furnishing of water practically impossible, so as to authorize suit for damages.

4. Damages ⚷22

Damages recoverable for breach of contract are such as appear from evidence to be reasonable and probable result of breach.

5. Waters and water courses ⚷263

Measure of damages for breach of contract to furnish water for irrigation of land for grazing purposes is loss sustained in past together with loss which is reasonably likely to be sustained in future (Civ. Code, § 3301).

6. Waters and water courses ⚷263

Where breach of contract to furnish water for irrigation purposes results in possible loss of future crops, measure of damages is difference in rental value of land with and without water (Civ. Code, § 3301).

7. Waters and water courses ⚷263

In suit for damages for breach of contract to furnish water for irrigation purposes, evidence concerning market value of land with and without water *held* inadmissible as not being proper measure of damages (Civ. Code, § 3301).

8. Waters and water courses ⚷263

In suit for damages for breach of contract to furnish water for irrigation purposes, award of damages *held* unauthorized where landowner had not sustained loss in past by virtue of never having irrigated land and it did not appear that he intended to irrigate land in future, or that he could not purchase water as cheaply from irrigation company's successor (Civ. Code, § 3301).

◆

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Suit by C. A. Crane and another against the East Side Canal & Irrigation Company. From a judgment for the plaintiffs, the defendant appeals.

Reversed.

Fred B. Wood, of San Francisco, Norris J. Burke, of Sacramento, and Hugh K. Landram, of Merced, for appellant.

Treadwell, Laughlin & Treadwell, of San Francisco, and C. Ray Robinson, of Merced, for respondents.

PER CURIAM.

The defendant has appealed from a judgment of $19,200, which was rendered against it pursuant to a verdict returned in a suit for damages based on anticipated depreciation of the value of farm land on account of the inability of the defendant to fulfill the terms of a contract to furnish plaintiff C. A. Crane with water for the purpose of irrigation. After accepting the obligation of a contract to supply the plaintiff with water, the defendant conveyed its water rights to other parties so that it is unable to supply the water in fulfillment of the agreement. During more than twenty years that the plaintiff owned the land which is involved in this suit, he never used any water provided for by the contract. The cause, however, is based on the doctrine of anticipatory breach of contract and the expected damages as a result thereof.

For more than twenty years the plaintiff C. A. Crane has been engaged in the cattle business. During all of that time he owned 1,280 acres of grazing land which is included in adjacent sections 19 and 30, township 8 south, range 12 east, M. D. B. & M., in Merced county. This land is situated about ten miles southwest of the city of Merced. It is located twelve miles south of the Merced river, three miles north of the San Joaquin river, and fifteen miles easterly from the confluence of these two streams. In the vicinity of that property are Owens creek, Duck creek, Mariposa creek, and Dead Man creek. The Mariposa slough also lies to the south of plaintiff's land. This land is comparatively flat and level. It has never been cultivated for crops. It has always been used exclusively for grazing cattle thereon. While there is evidence that, with proper cultivation, the land would produce barley, rice, and alfalfa, there is no evidence that the plaintiff ever intends to use it for that purpose.

For more than forty years J. J. Stevinson, who was also engaged in the cattle business, owned a vast tract of land consisting of thousands of acres occupying the intervening space between the Merced river and the San Joaquin river westerly from plaintiff's property. Stevinson also possessed riparian, prescriptive, and appropriative water rights in that vicinity incident to both the Merced river and the San Joaquin river. March 21, 1898, Stevinson conveyed these water rights to the defendant East Side Canal & Irrigation Company, a corporation, of which he was then president and principal stockholder. The Occidental Land & Improvement Company, a corporation, which then owned sections 19 and 30 hereinbefore mentioned, also owned valuable and extensive water rights in the same vicinity. On the last-mentioned date, in consideration of conveying to the defendant corporation a right of way across sections 19 and 30 to be used for the construction and maintenance of an irrigation canal, it executed and delivered to the owner of those sections of land a contract, by the terms of which it was agreed the grantee and its successors in title would furnish the grantor of the right of way, and its successors, "all the water that may be required" for irrigating sections 19 and 30, not to exceed 14 cubic feet of water per second, to be paid for at the rate of not to exceed $2 per acre. This contract also provides that in consideration of the sum of $25 for each season, the owner of the land may close the canal gates in August and September of any year to flood the land east of the canal to a depth of not to exceed 18 inches for the purpose of irrigating the soil to produce grass or pasture. Sections 19 and 30 were subsequently conveyed to the plaintiff, who ever since has owned and still does own that land.

The agreement referred to reads, in part:

"That the said party of the first part does hereby sell and convey to the said party of the second part, its successors and assigns forever, a right of way for an irrigating canal upon and through sections nineteen (19) and thirty (30) * * *

"Said second party agrees for itself, its successors and assigns, that it will deliver and furnish to the first party from the main canal above mentioned, all the water that may be required, not exceeding at any time, fourteen (14) cubic feet of water per second, for the purpose of irrigating said sections * * * from the first day of March, 1898, and during the existence of said corporation and its successor or successors in interest, and that it will charge and collect from said first party, its successors and assigns, for said water, such rate per acre, irrigated as may be charged and collected for other lands irrigated by water from said canal, providing, however, that in no one year shall said charge for water for irrigating said lands exceed the sum of Two (2) Dollars, per acre, for each acre irrigated.

"Said second party also agrees that upon payment to it or its successors in interest, of twenty-five (25) dollars, said first party may, in August or September of any year, for the purpose of irrigating the natural grass or pasture upon those parts of sections nineteen (19) and thirty (30) * * * close the canal gates and back the water over so much of said lands as it will cover when standing to a height of eighteen (18) inches above the general level of land on east line of right of way on the east bank of the canal.

"It is understood and agreed that the water to be furnished under this agreement is intended to form a part of the appurtenances to said described land and the right thereto shall be transferable only with and run with said land, and that the party of the second part is bound by this instrument to all subsequent owners of said land but to no other person or persons.

"It is covenanted and agreed by the parties hereto that the party of the second part shall not be responsible for the deficiency of water caused by drouth or insufficiency of water in the river, temporary damage by flood or other accident, but that the party of the second part shall employ due diligence at all times in restoring and protecting the flow of water in its canal."

At no time prior to the commencement of this suit did the plaintiff ever request the defendant to furnish him with water, nor did he use water pursuant to the terms of the preceding contract.

March 19, 1928, in consideration of the sum of $200,000, and of the dismissal of all pending actions involving water rights, the defendant corporation and J. J. Stevinson conveyed to the Southern California Edison Company, a corporation, the absolute right to "take, divert, use and store water," without limitation of time, from the San Joaquin river for irrigation and for hydro-electric power purpose, together with "an easement in the canals and works" of the defendant. The sole condition of this grant of water rights is that the Edison Company shall return the water used for power purpose to the San Joaquin river at a point "above Herndon in Fresno County," which is 60 miles below the property of the plaintiff. So, also, on January 21, 1929, in consideration of the sum of $100,000, and the dismissal of all pending suits involving water rights, J. J. Stevinson, a corporation, conveyed to seven other water companies all of its water rights on the San Joaquin river within Merced county.

As a part of the consideration for the grants last mentioned, the defendant and J. J. Stevinson dismissed the actions in all pending litigation involving their water rights. The respondent contends the conveyances of these water rights and the dismissal of these pending suits render it impossible for the defendant to fulfill its previous contract of March 16, 1898, to supply plaintiff with water to irrigate his land in sections 19 and 30, if he should desire the use of that water at any time in the future. It is asserted by the respondent that this conduct on the part of the defendant constitutes an anticipatory breach of the contract to furnish the plaintiff with water, which authorizes the maintenance of a suit for damages for all loss which is reasonably attributable thereto.

Upon that theory this suit was commenced. It was tried with a jury which returned a verdict of $25,000 in favor of the plaintiff. On a motion for new trial the amount of the judgment was reduced by the trial court to $19,200, which sum was accepted by the plaintiff as satisfactory. From that judgment the defendant has appealed.

On appeal it is contended the conveyance of the water rights and the dismissal of the suits by the defendant do not constitute an anticipatory breach of the contract to furnish plaintiff water; that the verdict and judgment are not supported by the evidence for the reason that there is no competent evidence of past or future damages, and because there is no evidence that plaintiff ever did use water under the terms of the contract, or that it is probable they ever will require the use of the water for that purpose in the future. It is also asserted the court erred in receiving evidence and in giving to the jury and refusing to give certain instructions.

[1-3] We are of the opinion the evidence in this case shows an anticipatory breach of the contract on the part of the defendant to furnish the plaintiff with water for irrigation of sections 19 and 30, township 8 south, range 12 east, in Merced county, by the defendant conveying to other parties all of its title to nonriparian water rights in that vicinity, and thus rendering it practically impossible for the grantor to fulfill the agreement. An anticipatory breach of contract occurs on the part of one of the parties to the instrument when he positively repudiates the contract by acts or statements indicating that he will not or cannot substantially perform essential terms thereof, or by voluntarily transferring to a third person the property rights which are essential to a substantial performance of the previous agreement, or by a voluntary act which renders substantial performance of the contract impossible or apparently impossible. 1 Restatement of the Law of Contracts, p. 475, § 318; 6 Cal. Jur. p. 457, § 273; 3 Elliott on Contracts, p. 206, §§ 2028–2039; 3 Page on Contracts, p. 2220, §§ 1436–1443.

The appellant asserts that the doctrine of anticipatory breach of contract does not apply to the facts of this case, under our California decisions, for the reason that it has been held the mere conveyance of real property, or an interest therein, by a party to a previous contract for its sale before the time of performance does not necessarily prevent the grantor from fulfilling the agreement since he may subsequently acquire the title thereto by a reconveyance of the property before the agreed time of performance, enabling the vendor to thus fully perform the terms of the contract. The earlier California cases to that effect, however, are distinguished by the case of Brimmer v. Salisbury, 167 Cal. 522, 140 P. 30, 34, wherein it is said that if the vendor conveys the property *without protecting the rights of the other contracting party* under an unfulfilled executory agreement, the subsequent conveyance will be deemed to be a breach of the contract so as to entitle the injured party to sue for all damages accruing as a result thereof on the doctrine of anticipatory breach of contract. That case holds that the contract is not breached if the vendor of the land does convey it subject to the prior rights assured by the contract, or otherwise protects those rights against the subsequent conveyance. The court says in that regard: "Our adjudications hold that, in an action for breach of contract based upon a conveyance by the vendor to a third person during the existence of such an executory contract of sale, the averment merely that the vendor has sold does not state a complete cause of action; the reason being given in Easton v. Montgomery [90 Cal. 307, 27 P. 280, 25 Am. St. Rep. 123], supra, and repeated and reaffirmed in the Shively Case [99 Cal. 259, 33 P. 848], supra, and again in the Garberino Case [109 Cal. 125, 41 P. 857], supra. * * * *A vendor will not have breached his contract if he shall have conveyed the property subject to or under circumstances such as do protect the rights of his vendee.* * * * Where a vendee contracts with one having none or an imperfect title, he contracts in the hope or expectation that the vendor may be able to perfect the title. Such is not the case where the vendor has title and thereafter parts with it. * * * It is, of course, no answer to say that the vendor thereafter may be able to go into the open market and repurchase the property. Common experience tells us that such an expectation is in its nature but a remote possibility and that such a vendor has not the slightest intention of so doing."

The Brimmer Case, supra, contains a complete review of the previous leading cases in California regarding that subject, and it holds that the mere conveyance of real property in violation of the express terms of a previous executory contract to sell land to another person may not be deemed to be a breach of the agreement unless the vendor fails to transfer the property subject to the prior rights secured by the executory contract or fails in some manner to protect the prior rights. It is there said: "A vendor will not have breached his contract *if he shall have conveyed the property subject to or under circumstances such as do protect the rights of his vendee.*" It follows that if the property is conveyed without protecting the interest secured by a previous executory contract with relation thereto, the subsequent transfer of title does constitute a breach of the previous agreement which authorizes a suit for damages on the doctrine of anticipatory breach of contract. Heden v. Point Reyes Land Co., 185 Cal. 121, 125, 196 P. 44. In the present case the water rights were conveyed by the defendant without attempting to protect the interest of the plaintiffs. There is no reasonable probability that the defendant ever will or can repossess these water rights so that it could fulfill the contract with plaintiffs. The doctrine of anticipatory breach of contract therefore applies to the circumstances of this case.

There is, however, no satisfactory evidence of detriment to the plaintiff on account of the conveyance of the defendant's water rights. The evidence fails to support the judgment with respect to the amount of damages awarded. The record is uncontradicted that for more than twenty years after the execution of the contract of March 21, 1898, to supply the plaintiff with water for irrigation of his 1,280 acres of land, he continued to use the land only for grazing stock. He never exercised his right to purchase water under the provisions of that contract during that entire period of time, or at all. He continued to use the land, as he had always used it, without irrigation. There is evidence that the land, under proper cultivation, might produce barley, rice, or alfalfa; but there is no evidence that the plaintiff ever intends to use it for that purpose. There is no evidence that the natural growth of grass on the property, which was relied on by the plaintiff to feed his stock, would ever be affected by the lack of water which might have been supplied under the terms of the contract. There is no evidence that the future use of water for irrigation purpose could not be purchased from the parties to whom the defendant sold its water rights for the same price which was fixed by the contract. The only evidence of alleged damages for anticipatory breach of the contract was furnished by four witnesses who testified that the market value of the property with the water rights attached thereto as provided by the terms of the contract prior to January 21, 1929, when the water rights were conveyed, was from $50 to $75 an acre, and that the market value of the land without the water rights was only $25 per acre. With the exception of the testimony of one witness, this evidence was adduced over the objection of the appellant that, "It is incompetent, irrelevant and immaterial, * * * and is not a proper measure of valuation and not based upon the evidence in this case."

[4, 5] We are of the opinion the damages which were awarded in this suit are too remote, uncertain, and speculative to support the judgment. The only damages which may be recovered for the breach of a contract are such as appear from the evidence to be the reasonable and probable result of the breach. 17 C. J. p. 742, § 76. This is a suit for damages for breach of a contract to furnish water for irrigation of land for grazing purpose. It was never used for any other purpose. There is no evidence that it ever will be used for any other purpose, or that it is the intention of the plaintiff to attempt to use it for any other purpose. The plaintiff is entitled to compensatory damages for breach of the contract measured by the loss which he has actually sustained in the past together with the loss which the evidence shows that he is reasonably likely to sustain in the future. The evidence is uncontradicted that he sustained no loss in the past. It appears from the plaintiff's failure to use the water in the past twenty years and the absence of evidence that he ever intends to use the property for a different purpose in the future, that it is not reasonably probable he will sustain any loss in the future by virtue of the breach of contract.

Section 3301 of the Civil Code provides that "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."

Volume 1 of the Restatement of the Law of Contracts, p. 515, § 331, declares that:

"(1) Damages are recoverable for losses caused or for profits and other gains prevented by the breach only to the extent that the evidence affords a sufficient basis for estimating their amount in money *with reasonable certainty.*

"(2) Where the evidence does not afford a sufficient basis for a direct estimation of profits, but the breach is one that prevents the use and operation of the property from which profits would have been made, *damages may be measured by the rental value of the property* or by interest on the value of the property."

[6] The only measure of damages to the plaintiff's property which is suggested in the present case is the possible loss of future crops for lack of irrigation afforded by the terms of the contract. Under such circumstances the measure of damages for the breach of a contract to supply water is the difference in the rental value of the land with and without the water. Fresno Canal & Irr. Co. v. Perrin, 170 Cal. 411, 149 P. 805, 808; Pallett v. Murphy, 131 Cal. 192, 63 P. 366, 368; 3 Kinney on Irrigation, p. 3135, § 1698. The Pallett Case last cited was a suit for damages for failure to supply water for irrigation of farm land pursuant to the terms of a contract. The judgment for damages, based on the difference in the rental value of the land with and without the water, was affirmed. The court said in that regard: "The evidence objected to and received by the court was confined to the rental value of the land with and without water for irrigation. This was the true rule. Evidence as to the value of a possible crop that might be grown with the use of water would be as purely speculative as could well be imagined."

In the Fresno Canal & Irrigation Company Case, above cited, the defendant recovered damages on his cross-complaint for failure of the company to furnish him with water for irrigating his farm land. The only evidence of the measure of damages was confined to the difference in the rental value of the land with and without the water. The judgment was affirmed. The court said, regarding that measure of damages: "The only evidence offered regarding the measure of damages was proof of the annual rental values of the lands with water for irrigation and of the rental values without water. The measure of damages in such cases, where there has been total failure to deliver water as contracted for, 'is the difference between the rental value of the land with water and its value without it, *and the lawful price of the water should also be taken into consideration and deducted.*' Crow v. San Joaquin, 130 Cal. 314, 62 P. 562, 1058; Pallett v. Murphy, 131 Cal. 197, 63 P. 366."

[7] The respondent therefore erroneously assumed that the measure of damages under the circumstances of this case was the difference between the market value of the land with and without the water. The objections to the introduction of the evidence based on market value, only, should have been sustained.

Nor is the judgment aided by the fact that one witness testified without objection to the market value of the land with and without the water, for the reason that there is no evidence in the record based upon a proper measure of damages, and because there is not evidence that the land will be reasonably likely to be damaged on that account or that the plaintiff will sustain any loss in the future by virtue of the failure of the defendant to furnish the water pursuant to the terms of the contract. By the terms of the contract the defendant agreed to furnish plaintiff with water for irrigating his 1,280 acres of land for the sum of $2 an acre, and he was also permitted to close the gates of the canal which crosses his property and flood the lower land from the water of the canal during specified months of any year for the further sum of $25 a season. The evidence is undisputed that the plaintiff has never exercised these privileges. There is no evidence that he ever intends to do so. There is no evidence that it would cost the plaintiff any greater sum of money to irrigate his land in the future, if he ever decides to do so, by purchasing the water from the irrigating company to which the water rights were conveyed by the defendant than it would have cost him under the terms of the water contract.

[8] For the reason that the award of damages is too remote, speculative, and uncertain, and because it is not supported by satisfactory evidence, it becomes necessary to reverse the judgment.

The appellant has assigned other errors in the admission of evidence and in giving to the jury and refusing to give certain instructions, which are unnecessary for us to determine in view of the foregoing conclusions which dispose of this appeal.

The judgment is reversed.

2 Cal.App.2d 643

PEOPLE v. CHADDOCK.

Cr. 2617.

District Court of Appeal, Second District, Division 2, California.

Dec. 6, 1934.

1. Criminal law ⚷1159(2)

Verdict supported by evidence cannot be disturbed unless manifest error affecting substantial rights of accused occurred at trial, or unless evidence is so inherently improbable that conviction must have been predicated upon passion and prejudice.

2. Criminal law ⚷1159(3)

Conflict in evidence created by contradiction or otherwise does not constitute inherent improbability or alone warrant reversal of conviction.

3. Infants ⚷20

Testimony of complaining witness in prosecution for committing lewd or lascivious acts upon child need not be corroborated (Pen. Code, § 288).

4. Criminal law ⚷935(1)

Trial judge has broad discretionary power in ruling on motion for new trial on grounds involving sufficiency of evidence.

5. Criminal law ⚷1144(18)

Reviewing court must assume that trial court acted with full appreciation of his duties and obligations in denying motion for new trial.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Harold F. Chaddock was convicted of an offense, and he appeals.

Affirmed.

Wm. J. Clark, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

WILLIS, Justice pro tem.

Appellant was tried by the judge of the court below without a jury and found guilty on all three counts in an information charging violations of the provisions of section 288 of the Penal Code. A motion for new trial was made upon the grounds: (1) Errors in decision of questions of law arising during the course of trial; (2) that the judgment is contrary to law; and (3) that the judgment is contrary to the evidence. The motion was denied, and from the order denying it this appeal is prosecuted.

It is contended, first, that the evidence so clearly preponderates in favor of the innocence of the accused that the judgment of conviction must as a matter of law be attributed to some unconscious prejudice on the part of the court, rather than to the persuasive effect of the evidence against the defendant; and, second, that errors of law occurred at the trial which should have caused the court to grant the motion for a new trial.

[1] It would serve no useful purpose to review and restate herein the evidence. Suffice it to say that we have carefully read and considered it in the light of the argument presented thereon, and we find therein substantial evidence to support the finding of guilt on each of the three counts. We are, therefore, not free to disturb the decision of the trial court thereon unless manifest error affecting substantial rights of the accused occurred at the trial, or unless the evidence is so inherently improbable that the conviction can only be predicated on the influence of passion and prejudice.

With appellant's contentions and the foregoing rule respecting the character of evidence of guilt in mind, we have reviewed the testimony and find no indicia of improbability, either inherent or manifest, in the story told by the child in question in her recitation of the acts and circumstances of either of the three offenses charged. Nor is there in the record of the proceedings in the trial court any indication that prejudice crept into the judge's mind from the story of the girl.

[2-5] Conflict in evidence created by contradiction or otherwise does not constitute inherent improbability nor of itself alone constitute ground for reversal by this court. People v. Amadio, 25 Cal. App. 729, 145 P. 151; People v. Maine, 93 Cal. App. 141, 269 P. 194; People v. Vosger, 123 Cal. App. 503, 11 P. (2d) 649; People v. Becker (Cal. App.) 35 P. (2d) 196. Nor is there any rule which requires the testimony of the complaining witness in a case under section 288 of the Penal Code to be corroborated. People v. Hulbart, 55 Cal. App. 112, 202 P. 939; People v. Geonzelis, 106 Cal. App. 434, 289 P. 667; People v. Kaiser, 119 Cal. 456, 51 P. 702. In ruling on a motion for a new trial on grounds involving the sufficiency of the evidence, the trial judge is clothed with broad discretionary power. In the instant case he saw and heard the witnesses give testimony. We

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

must assume that he acted with a full appreciation of his duties and obligations in denying the motion for new trial, and there is surely no basis in the case before us for the substitution of the discretion of this court for that of the trial court. People v. McAllister, 99 Cal. App. 37, 277 P. 1082.

Appellant presents a number of asserted errors of law arising from rulings by the court on admissibility of evidence, but we find no reversible error in such rulings. Even if error could be predicated on any thereof, it is manifest to us that no prejudice resulted; nor could they reasonably be expected to affect any substantial right of appellant, and therefore must be disregarded. Const. art. 6, § 4½; section 1258, Pen. Code.

The order denying motion for new trial is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

◆

2 Cal.App.2d 494

SAN DIEGO COUNTY v. CROGHAN et al.

Civ. 1145.

District Court of Appeal, Fourth District, California.

Nov. 28, 1934.

1. Taxation 🔑913(1)

County is lawful custodian of funds collected by county tax collector and must disburse them in accordance with law, and must account to various political subdivisions for moneys collected for their use (Pol. Code, §§ 3753, 3754, 4126).

2 Taxation 🔑556

County tax collector is responsible for safe-keeping and delivery of money collected into county treasury (Pol. Code, §§ 3753, 3754, 4126).

3. Taxation 🔑557(1)

County may require return of money unlawfully abstracted, after collection, by some one in tax collector's office, regardless of whether county is trustee or bailee of money of other political subdivisions.

4. Taxation 🔑557(1)

Tax collector cannot question right of county to sue for funds unlawfully abstracted by some one in tax collector's office, since he had no property in them and his only duty was to collect them and pay them into county treasury (Pol. Code, §§ 3753, 3754, 4126).

5. Taxation 🔑570(1)

In action against county tax collector and his surety for moneys unlawfully abstracted by some one in tax collector's office, tax collector *held* not entitled to set off against surety company defalcations by deputies, where deputies' bonds were payable to state and tax collector had not paid any of purported defalcations of deputies (Pol. Code, § 961).

6. Taxation 🔑570(2)

No one other than obligee can bring suit on bond of deputy county tax collector unless he is injured or aggrieved by defalcation of principal (Pol. Code, § 961).

7. Taxation 🔑570(4)

In action against county tax collector and surety, amount of defalcations of deputy tax collectors could not be determined, since they were not made parties and question was not within issues formed by pleadings.

8. Subrogation 🔑8

When county tax collector's surety paid county amount of tax collector's shortage, it became subrogated to all rights of principal creditor which it had paid and also to all rights of collector to recoup its losses in any manner that collector could have done had he paid instead of surety, and, therefore, was subrogated to all rights of action against deputy collectors.

9. Subrogation 🔑36

Surety's right of subrogation goes back to date of contract of suretyship and takes priority over prior assignment, so that assignee of salary of tax collector, with notice of facts, could not have priority over rights of surety which paid assignor's shortages.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by the County of San Diego against Herbert A. Croghan and another, in which defendant American Surety Company of New York filed a cross-complaint against named defendant, and in which M. W. Conkling intervened. From a judgment in favor of the American Surety Company of New York against Croghan and intervener, they appeal.

Affirmed.

Harry W. Horton, of El Centro, and M. W. Conkling, of San Diego, for appellants.

Thomas Whelan, Dist. Atty, F. T. Dunn and F. P. Buckley, Deputy Dist. Attys., and James G. Pfanstiel, all of San Diego, and Mathes & Sheppard, James C. Sheppard, and George R. Richter, Jr., all of Los Angeles, for respondents.

MARKS, Justice.

For a number of years H. A. Croghan was tax collector of the county of San Diego with the American Surety Company of New York as surety on his official bonds. On January 15, 1932, the county of San Diego instituted this action against Croghan and the surety company to recover money collected as taxes by Croghan and not deposited with the county treasurer of San Diego county. Croghan and the surety company filed separate answers to the complaint and the surety company filed a cross-complaint against Croghan and others whereby it alleged that the county had withheld from Croghan his salary in the sum of $3,737.10, accruing since the shortages were discovered, asking a restraining order preventing the withdrawal of this money from the county treasury, and seeking for judgment over against Croghan in any amount it might be compelled to pay on the bond, and that it be subrogated to Croghan's salary up to an amount it should pay on the bond. In his answer to the cross-complaint Croghan alleged that any shortage in his official collections, if one existed, was caused by the peculations of two of his deputies and that the surety company executed surety bonds for these deputies in the sum of $7,500 each. The deputies were not made parties to the action. On February 16, 1933, and at the time of the trial, M. W. Conkling intervened, claiming the unpaid salary under an assignment given him by Croghan on July 27, 1932, in consideration of attorney's fees principally earned in the case of People v. Croghan, 131 Cal.App. 351, 21 P.(2d) 614. On the issues thus framed the case proceeded to trial.

At the trial it was stipulated by all parties that the shortages in Croghan's accounts against which the statute of limitations had not run in favor of the surety amounted to $18,390.93. This amount was paid by the surety to the county in open court in the presence of counsel for all parties, who stipulated that it was correct, Croghan maintaining, and offering to prove, that the money did not all belong to the county, but included collections of taxes for cities, irrigation and school districts in San Diego county. The complaint of the plaintiff was not dismissed, but all parties proceeded as though such dismissal had been entered. The only issues tried were those framed by the cross-complaint, the complaint in intervention and the answers to these pleadings. The judgment was responsive to these issues and no others. The American Surety Company of New York was given judgment against Croghan for $18,390.93, together with accrued interest in the sum of $321.82, and costs. The county was ordered to cancel the salary warrants issued in Croghan's name and to pay their amounts, totaling $3,737.10, to the surety, and that this payment be credited on the judgment against Croghan and partial satisfaction be entered for the amount paid. Such partial satisfaction of the judgment is incorporated in the record. This judgment is now before us for review.

Croghan urges that: (1) The county can only recover the tax money collected for its own use and not that collected for cities, irrigation and school districts; and (2) that he should have been permitted to offset against the judgment in favor of the surety on his bond, which was also surety on the bonds of his deputies, the amounts of their alleged defalcations.

Intervener urges two additional grounds for reversal of the judgment: (1) That where the salary of an officer is earned and assigned, but not paid, and suit is brought by the county against the officer and his surety, and judgment is entered for the full amount of the shortage without deduction of the unpaid salary and the surety pays the judgment, it does not acquire a lien upon the unpaid salary. (2) That the officer's salary cannot be offset against a judgment where the county is suing as trustee of an implied trust.

In the briefs of both appellants many of their arguments are based upon the assumption that the county of San Diego recovered a judgment against Croghan which is before us on this appeal. Such is not the case. As we have observed, the judgment before us is in favor of the surety company against Croghan and intervener. If there was a judgment in favor of the county it is not in the record. Therefore, the right of the county to sue its tax collector for shortages in its own funds, and funds collected for cities, irrigation and school districts, is not directly involved in this appeal.

[1-4] The duty of collecting these taxes is imposed by law upon the county tax collector. He is required by law to settle with the county auditor monthly (section 3753, Pol. Code) for all collections and pay all moneys collected to the county treasurer (sections 3753, 4126, Pol. Code). If he fails to do this for five days,

he is liable for the full amount of taxes charged upon the assessment roll. Section 3754, Pol. Code. The county is the lawful custodian of these funds and must disburse them in accordance with law. Buena Vista W. S. Dist. v. Shields, 126 Cal. App. 241, 14 P.(2d) 559, 15 P.(2d) 861. It must account to the various political subdivisions for the moneys collected for their use. City of Fullerton v. County of Orange (Cal.App.) 35 P.(2d) 397. It is immaterial in this case whether the county is a trustee of the tax money collected for the use of other political subdivisions or merely a bailee of such money. It was lawfully collected by its officer and the money was unlawfully abstracted by some one in the tax collector's office. It did not belong to the tax collector or his deputies and he is responsible for its safe-keeping and delivery into the county treasury. The county, whether a trustee or bailee of the money of other political subdivisions, may require the return of the money. Miller & Lux v. Batz, 142 Cal. 447, 76 P. 42; MacMullan v. Kelly, 19 Cal.App. 700, 127 P. 819; Bode v. Lee, 102 Cal. 583, 36 P. 936. A political subdivision may sue the surety on the bond, collect the money misappropriated, and disburse the funds so collected to the political subdivisions lawfully entitled to any part of it. Municipal Bond Co. v. City of Riverside, 138 Cal.App. 267, 32 P.(2d) 661. The tax collector cannot question the right of the county to sue for these funds as he had no property in them and his only duty is to collect them and pay them into the county treasury. Placer County v. Astin, 8 Cal. 304; People v. Love, 25 Cal. 520; McKee v. Monterey County, 51 Cal. 275; City and County of San Francisco v. Ford, 52 Cal. 198; People v. Bunker, 70 Cal. 212, 11 P. 703.

[5-7] Croghan's attempted defense that he was entitled to set off against the surety company any defalcations by his deputies must fail for the following reasons:

The bonds of the deputies were made payable to the state of California. No one other than the obligee can bring suit on such bond unless such an one is injured or aggrieved by the defalcation of the principal. Section 961, Pol. Code; Municipal Bond Co. v. City of Riverside, supra, and cases cited. There was no claim made during the trial that Croghan had paid any of the purported defalcations of his deputies. Up to the time of such payment by him he could not have been injured or aggrieved by such defalcations, if any. The only payment out of funds once belonging to Croghan was the application on the judgment after it was rendered of his past due salary in the amount of $3,737.10, leaving a balance unpaid of $14,986.15. The total of the bonds of the two deputies amounted to $15,000 or $13.85 more than the balance of the judgment exclusive of interest on it. Interest accruing between the date of the judgment and the credit on it amounted to over $17. The amount of the defalcations of the deputies, if any, was not and could not have been determined in this action as they were not made parties to it and such question is not within the issues formed by the pleadings. Croghan was not entitled to set off any supposed defalcations of his deputies under the facts here disclosed.

[8] When the surety paid to the county of San Diego the amount of Croghan's shortage, it became subrogated to all the rights of the principal creditor which it had paid. In Estate of Elizalde, 182 Cal. 427, at page 433, 188 P. 560, 562, it is said: "A surety, upon satisfying his principal's obligation, is entitled to be subrogated, not only to the rights and remedies of the creditor against the principal connected with the debt, but is also entitled to be subrogated to the similar rights and remedies of the principal against the creditor. In Sheldon on Subrogation, at section 1, it is said: 'Subrogation is a doctrine of equity jurisprudence although its principles are often applied in courts of common law; especially in those states in which equitable remedies are administered through the forms of law. It is a substitution ordinarily of another person in the place of a creditor. * * * More broadly, it is the substitution of one person in the place of another, whether as a creditor or as the possessor of any other rightful claim. * * * In this country its principles have been more widely developed and its doctrine more generally applied than in England. * * * It is so administered (here) as to secure real and essential justice without regard to form. * * *'" The surety also became subrogated to all of the rights of its principal (Croghan) to recoup its losses in any manner that Croghan could have done had he paid instead of his surety. Title Guaranty, etc., Co. v. Duarte, 54 Cal. App. 260, 201 P. 790. It follows that the American Surety Company was subrogated to all rights of action against the deputies. Seward v. National Surety Co., 120 Ohio St. 47, 165 N. E. 537; Brinson v. Thomas, 55 N. C. 414.

The foregoing considerations effectively dispose of the material contentions made by Croghan on this appeal. There remains for decision the appeal of the intervener, who claims the salary of Croghan under an assignment given him prior to the payment by the surety of the salary.

[9] In addition to the doctrine of the subrogation of a surety on the payment of the debt of the principal which we have already set forth, it seems to be settled by good authority that the right of subrogation goes back to the date of the contract of suretyship and takes priority over a prior assignment. Prairie State Nat. Bank v. United States, 164 U. S. 227, 17 S. Ct. 142, 41 L. Ed. 412; Henningsen v. United States Fidelity & Guaranty Co., 208 U. S. 404, 28 S. Ct. 389, 52 L. Ed. 547; American Surety Co. of N. Y. v. Vinton, 224 Mass. 337, 112 N. E. 954; Fidelity & Casualty Co. of New York v. Livingston, 234 Mich. 375, 208 N. W. 446; Laski v. State, 217 App. Div. 420, 217 N. Y. S. 48.

The intervener was attorney for Croghan in this and other actions involving and growing out of the shortage in the tax collector's office. He had notice of all of the facts and circumstances of the cases prior to taking the assignment. His assignment cannot take priority over the rights of the surety which paid his assignor's shortages. The cases last cited establish this principle. See, also, Farmers' State Bank of Richardton v. Stieg, 56 N. D. 851, 219 N. W. 776; McKinley v. Smith, 128 Cal. App. 591, 17 P.(2d) 1032. Under the circumstances here disclosed the assignee has no better title than his assignor. McKinley v. Smith, supra.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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2 Cal.App.2d 528

SPEIDEL v. LACER et al.

Civ. 9168.

District Court of Appeal, First District, Division 1, California.

Dec. 3, 1934.

1. Negligence 🔑121(2)

Doctrine of "res ipsa loquitur" does not apply unless instrument causing injury is under exclusive control and management of defendant.

[Ed. Note.—For other definitions of "Res Ipsa Loquitur," see Words & Phrases.]

2. Negligence 🔑121(3)

Installers of automatic hydraulic automobile hoist in service station were not liable under res ipsa loquitur doctrine for injuries to concrete worker replacing paving around base of hoist caused by defective operation of valve, where service station employees had partial control of hoist and exclusive control of air compression plant used to operate it.

3. Trial 🔑296(4, 5)

Instruction that contributory negligence no matter how slight would preclude recovery no matter how great defendant's negligence, while incomplete, *held* not reversible error, in view of other instructions that, unless plaintiff's negligence proximately caused or contributed to accident, it would not preclude recovery.

4. Appeal and error 🔑1002

Where there is evidence given upon any particular question and it is left to jury to determine weight or credibility of witnesses and value of testimony, appellate court will not disturb jury's finding upon such disputed questions of fact.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Paul F. Speidel against E. B. Lacer, a former copartnership consisting of Elmer B. Lacer, now deceased, and Edward A. Green, formerly transacting business under the common name of E. B. Lacer, and others. From an adverse judgment, plaintiff appeals.

Affirmed.

Ford & Johnson, of San Francisco, for appellant.

Joseph T. O'Connor, R. E. Fitzgerald, and Leo R. Friedman, all of San Francisco, for respondents.

JOHNSTON, Justice pro tem.

The facts in the above-entitled cause are that a few days prior to the 24th day of August, 1928, the Standard Oil Company of California was maintaining and operating a service station in the city and county of San Francisco, at Fourth avenue and California street. The said Standard Oil Company had been maintaining said station for many years and had had various equipment at said station for the purpose of greasing and caring for auto vehicles. Desiring to increase the capacity of said equipment the said Standard Oil Company of California entered into a contract with defendants "E. B. Lacer, a former copartnership consisting of Elmer B. Lacer, deceased, and Edward A. Green, formerly transacting business under the common name of E. B. Lacer," which said E. B. Lacer copartnership will be hereafter referred to as "respondent," and said respondent proceeded to install at the said station an automatic hydraulic automobile lift or hoist, which was to be used by the said Standard Oil Company of California in the maintenance and operation of said station. At a period of time of either one or two days previous to the 24th day of August, 1928, the said respondent placed said hoist in position, and on or about the 24th day of August, 1928, plaintiff Speidel, appellant herein, and who will hereinafter be referred to as appellant, was employed by the Standard Oil Company of California, owner and operator of said service station, to replace the concrete around the said hoist. On the 24th day of August, 1928, appellant proceeded to said service station upon request of and under instruction of the Standard Oil Company, and proceeded to place said concrete around said hoist. It appears that at the said time the said hoist was resting on or near the ground and was secured by the use of two bolts. Said hoist at the said time was connected with the air compression service of said station, under exclusive control of the Standard Oil Company. Appellant secured a crescent wrench from an employee of the Standard Oil Company of California, at which time respondents or their agents were not present or notified to be present, and proceeded to release said hoist, with the apparent intention of releasing said hoist so that an opportunity might be had for placing said concrete around the said hoist. After certain work was done by appellant toward releasing said hoist, the said hoist raised in such violent manner that appellant was seriously injured.

The contention of respondent is that they had left such hoist in a condition that concrete might be placed around it without the disturbance of the bolts holding said hoist in position; that the said hoist had been tested before, without injury to any person. However, after the injury to appellant, an examination of the valve in said hoist disclosed the presence of a piece of cast iron which is claimed by appellant to have interfered with the proper operation of the valve on said hoist. Appellant further claims that the necessary operation of said hoist with safety required that approximately thirty-five gallons of oil be placed in the cylinder of said hoist, in order that a proper regulation of application of air in raising said hoist be equalized; that the said oil had not been placed in said hoist; that it was the duty of respondent to have placed said oil in said cylinder, and that, by reason of the failure so to do, respondent was guilty of negligence proximately causing the injuries to appellant. Respondent claims that it was not customary to place the oil in said hoist until after the placing of concrete, for the reason that the weight of said oil would make the said hoist top heavy and might move it out of plumb.

Respondent further claims that they had not instructed appellant to place said concrete, that there was no privity of contractual relationship between appellant and respondent, and that respondent had no notice or knowledge of the contract between the Standard Oil Company and appellant.

As the title will indicate, this action was formerly brought against the Standard Oil Company of California, as well as E. B. Lacer et al. At the conclusion of the first trial a nonsuit was granted as to all defendants. Upon motion for new trial, a new trial was granted as against "E. B. Lacer (a former copartnership consisting of Elmer B. Lacer, now deceased, and Edward A. Green, formerly transacting business under the common name of E. B. Lacer), Edward A. Green, individually and as the surviving and liquidating partner of E. B. Lacer, a former copartnership, formerly transacting business under the common name of E. B. Lacer." The second trial was then had as against the last-named defendant, eliminating the Standard Oil Company of California from further consideration. At the conclusion of the second trial, the jury found a verdict against the plaintiff and appellant and in favor of respondents E. B. Lacer et al.; thereupon plaintiff and appellant moved for a new trial upon various grounds which said motion for new trial was denied by the trial court and from which said judgment plaintiff and appellant has appealed.

We have read the testimony as set forth in the transcript and have given careful consideration to the same. There is no particular question of fact involved in the action in so far as this appeal is concerned. Questions of law, in our judgment, are the only matters to be considered and we will devote our attention to them.

[1] I. Counsel for appellant complains of the fact that an instruction refused by the

court and found on page 497 of the transcript was not given. This instruction was refused by the trial court. The instruction has to do with that rule of law known as "Res Ipsa Loquitur," referring to White v. Spreckels, 10 Cal. App. 287, 101 P. 920, in which case we find that this court has held that the doctrine of "res ipsa loquitur" did not apply unless the instrument causing the injury was under the exclusive control and management of the defendant.

In Corpus Juris, volume 45, page 1214: "Ordinarily the mere fact of an accident or injury, even though it be such that by virtue of the doctrine it 'speaks for itself', does not identify the wrongdoer and permits no presumption or inference whatever as to who was to blame for the negligent act, and hence, as a necessary basis for the application of the doctrine, it must appear, in conformity with the statements of the rule, that the negligent cause or thing which produced the injury complained of was wholly and exclusively in the possession, and under the control or management, of defendant or his servants. Accordingly the doctrine cannot be invoked where there is a divided responsibility and the accident is due in part to the act of a third party over whom defendant has no control. * * *"

[2] From the testimony in this case it would appear as though the Standard Oil Company, if it did not have entire control, had at least partial control over the instrument which is claimed to have caused the damage to appellant. There is no testimony to show that respondent had been notified of the intention to place in operation the said instrument after respondent had installed and left the same. In fact, the sole control of said instrument, by reason of the opportunity of the Standard Oil Company's agents to operate the air compression, left it entirely within the Standard Oil Company's power to turn on or off the air compression. There is no evidence to show that respondent was ever consulted with reference to the time when said bolts mentioned in the transcript as being connected with the hoist were to be removed or when the cement paving was to be placed. In the case of divided responsibility, the doctrine of "res ipsa loquitur" could not be invoked. Under the testimony in this case, this court is of the opinion that the trial court was correct in its ruling in refusing the instruction complained of with reference to that doctrine.

There are numerous decisions cited by the respective parties. However, the Supreme Court of the United States has announced the general rule which in our judgment prevails (San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 98, 32 S. Ct. 399, 401, 56 L. Ed. 680): "When a thing which causes injury, without fault of the injured person, is shown to be under the *exclusive control of the defendant*, and the injury is such as, in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care." (Italics ours.)

From the testimony in this case it would seem that the exclusive control did not rest within respondent, but that the Standard Oil Company of California, if not having exclusive control, had at least partial control. Therefore respondent could not be held under the doctrine invoked by appellant. It further appears from the testimony that the compressed air used in raising said hoist was at all times under the control of the Standard Oil Company. Respondent had no control, under the evidence, of the operation of the compression plant used to operate said hoist. There was no evidence before the court, from an examination of the transcript, showing that any negligence upon the part of respondent indicated that respondent had not been careful in the erection and construction of said hoist, but without contradiction the testimony shows that the agent of respondent examined the valves connected with said hoist, and that said valves were in good operating condition at the time he left said hoist at a period of time of about one or two days previous to the accident. If the piece of metal which is alleged to have caused said accident entered the mechanism of said hoist, the jury must have found that it came from an outside source over which respondent had no control and which respondent with reasonable and ordinary care could not have guarded against. The character and description of said piece of metal indicated that it had no connection with any portion of the construction of said hoist or pipes leading thereto.

[3] II. Appellant complains of the instruction given at the request of the defendant, in words as follows: "No matter how slight the contributory negligence of a plaintiff may be, such plaintiff is not entitled to a verdict against such defendant, no matter how great the negligence of such defendant may be." While the instruction complained of does not contain a full exposition of the law with ref-

erence to contributory negligence, yet this instruction, in the light of later cited cases, must be considered with the instructions as given in their entirety. The court gave various instructions at the request of the plaintiff, some five in number, in which the jury was expressly instructed that, unless it found that plaintiff's negligence proximately caused or proximately contributed to the happening of the accident, plaintiff would not be prevented from recovering judgment.

Counsel for appellant has cited Douglas v. Southern Pacific Company, 203 Cal. 390, 264 P. 237. On page 396 of 203 Cal., 264 P. 237, 239, we find that the court has stated: "Jurors are presumed to be persons of common intelligence and capable of comprehending the ordinary use of language as applied to the particular proposition under consideration and in reference to which it is employed. We will not assume that they may not have understood the charge as we understand it. The instructions must be considered in their *entirety*, and if, as so considered, they state the law of the case *fairly and clearly*, then they are, as a whole, unobjectionable, even though by selecting isolated passages from single instructions they may in some respects be amenable to just criticism." (Italics ours.)

In Douglas v. Southern Pacific Co., supra, the court cites with approval Alloggi v. Southern Pacific Company, 37 Cal. App. 72, 79, 173 P. 1117: "'We are not unmindful of the rule that conflicting and contradictory instructions upon a material phase of the case require a reversal where it cannot be ascertained from the record before us which instruction prevailed, or was likely to prevail with the jury. While it is true that the instruction complained of in the present case is erroneous, and in a measure in conflict with several other instructions which correctly stated the rule of law relative to contributory negligence, nevertheless the correct rule of law *was so specifically stated and restated* to the jury that we feel that the idea in the several correct instructions must have preponderated in the consideration of the jury, and that as a consequence the erroneous instruction neither contributed to nor controlled the verdict.'" (Italics ours.) And on the same page, referring to Saltzen v. Associated Oil Company, 198 Cal. 157, 161, 244 P. 338: "'That this court ought not to adopt or give application to a rule that the positive effect of an express instruction upon a specific subject which is admittedly correct will be overcome by a general though erroneous instruction not expressly dealing with that subject in the absence of a very clear showing that the jury have been misled thereby.'" And from this we would conclude that the Supreme Court has held that, if the jury was not confused, and from the evidence in the case there is no conclusion that we could draw that it was confused, it would seem that the giving of an incomplete or imperfect instruction, if corrected by a later instruction, would not avail appellant.

III. Appellant further complains that, appellant and respondent being independent contractors on the same premises, the trial court erred in giving certain instructions complained of therein. We have carefully considered the instructions given, and, while some of the instructions were possibly incomplete, the instructions taken as a whole sufficiently set forth the law of the case.

[4] IV. The appellant further states that, because of the insufficiency of evidence, the court was not justified in instructing the jury upon the doctrine of contributory negligence. The evidence of the case warranted the giving of such instructions. There is sufficient evidence from which the trial court and jury might have found that certain acts of the plaintiff proximately contributed to the cause of the accident, if believed by the jury. The testimony of various defense witnesses, if believed by the jury, sufficiently warranted the court in instructing upon the question of contributory negligence. As before stated, where there is evidence given upon any particular question, and it is left to the jury to determine the weight or credibility of the witnesses and the value of the testimony, the jury having acted, the appellate court will not disturb the finding of the jury upon such disputed questions of fact. The presence of the piece of foreign metal in the valve is not satisfactorily accounted for by either party, but there is no evidence presented which apparently would show that the respondent was guilty of any negligence with reference to the presence of said piece of foreign metal in the valve. Therefore we conclude that the jury having heard the evidence, and having passed upon the same, we could not disturb its finding with reference to questions of fact; and with reference to the instructions of the court we find that in considering them as a whole the jury was fully instructed as to the law, and that, if incomplete instructions were given, the jury was not misled by the incomplete instructions, but that as a whole it was fully informed as to the law.

No other points raised by appellant are in our judgment of sufficient importance to be considered by this court. The court did not err in denying a motion for a new trial, and the judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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2 Cal.App.2d 616

PEOPLE v. SILVA.

Cr. 2593.

District Court of Appeal, Second District, Division 2, California.
Dec. 5, 1934.

Hearing Denied by Supreme Court
Jan. 3, 1935.

1. Criminal law 🔑1119(1)
Reviewing court is limited to record in determining whether clerk in trial court in reading information failed to omit reference to prior conviction as required by statute (Pen. Code, § 1025).

2. Criminal law 🔑1035(3)
In criminal prosecution, defendant's complaint that clerk in reading information failed to omit reference to prior conviction *held* not to show error where no objection was interposed and defendant on cross-examination admitted that he had theretofore suffered such felony conviction (Pen. Code, § 1025).

3. Witnesses 🔑337(5)
Defendant in criminal prosecution who took stand in his own behalf *held* properly asked on cross-examination whether he had suffered prior conviction of felony.

4. Burglary 🔑41(6)
Evidence *held* to support conviction of burglary in first degree where man resembling defendant, driving car resembling his, was seen at premises after dark on evening in question, coat stolen was being worn by defendant, and defendant made statements to officers connecting him with crime.

5. Criminal law 🔑1035(3)
Where defendant interposes no objection to remark of court or deputy district attorney and does not ask that jury be admonished to disregard remark, his objection will be deemed to have been waived on appeal.

◆

Appeal from Superior Court, Los Angeles County; E. N. Rector, Judge.

Antonio Silva was convicted of burglary in the first degree after prior conviction of a felony, and he appeals.

Affirmed.

Anna Zacsek, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Defendant was convicted of burglary in the first degree after prior conviction of a felony, to wit, burglary, which defendant had admitted on arraignment. He appeals from the judgment and order denying motion for new trial.

[1-3] After the jury was impaneled, the court directed the clerk to read the information, and thereupon the reporter's transcript shows: "(Information read and plea stated.)" Appellant asserts that the clerk read the entire information and failed to omit the reference to the prior conviction, as required by Penal Code, § 1025, thereby informing the jury that defendant had been convicted of a prior felony. We are limited to the record before us in determining such questions, and there is nothing to indicate that the matter of which appellant now complains transpired at the outset of the trial. No objection nor interruption of any kind was interposed directing the court's attention to any such irregularity or asking that any action be taken with reference thereto. Furthermore, the defendant took the stand in his own behalf and on cross-examination was properly asked (People v. Oliver, 7 Cal. App. 601, 95 P. 172) and admitted that he had theretofore suffered such felony conviction.

[4] The evidence supports the verdict. It is not questioned that the residence of the complaining witness was burglarized. A man resembling appellant, driving an old car resembling his, was seen at the premises after dark on the evening in question. A coat stolen at the time was being worn by appellant when arrested. The latter made statements to the officers connecting him with the commission of the crime. At the trial he

testified that he had agreed to plead guilty to two counts.

Certain instructions given and omitted are complained of as giving the jury an erroneous and prejudicial view of the law applicable to the facts in the case. We have read the court's entire charge together with the requested instructions which were omitted, and it appears that the jury was fully and correctly instructed on all essential matters and that the allegations of error are not of substantial merit.

We find nothing in the conflicting evidence as to the voluntary character of appellant's statements which would require us to say as a matter of law that they should not have been admitted. Such testimony was submitted to the jury with instruction to consider it only if it was found to be free and voluntary.

[5] Just before the case was submitted to the jury the court remarked: "Before I read the forms of verdict, I will ask is there any evidence whatsoever on which a verdict of burglary in the second degree could be rendered?" to which the deputy district attorney replied, "Yes. That is for the jury to decide, your honor." Appellant interposed no objection and did not ask that the jury be admonished to disregard the remark. His objection will be deemed to have been waived on appeal. People v. Bernal, 40 Cal. App. 358, 180 P. 825.

Judgment and order affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

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2 Cal.App.2d 646

GENERAL MOTORS ACCEPTANCE CORPORATION v. BROWN.

Civ. 5053.

District Court of Appeal, Third District, California.

Dec. 6, 1934.

1. Sales 🔑479(14)

Under terms of conditional sale contract, seller *held* entitled to repossess automobile sold on default by buyer, resell it at private sale crediting proceeds to buyer, and then sue him for unpaid balance of purchase price, as against contention that seller could not both secure automobile and original selling price.

2. Appeal and error 🔑1011(1)

Finding that seller's agent made agreement with buyer to cancel unpaid balance of purchase price of automobile on repossession for default in payment of installments under conditional sale contract *held* conclusive, on conflicting evidence.

3. Principal and agent 🔑111(1)

Express power of seller's agent to collect deferred installments of purchase price, and, upon buyer's failure to pay them, to repossess automobile in accordance with terms of conditional sale contract, *held* not to imply power to cancel balance remaining due on repossession in conflict with contract.

4. Compromise and settlement 🔑5(3)

Obligation of buyer to pay entire purchase price of automobile could not be extinguished by acceptance of part performance of conditional sale contract after breach thereof, or satisfaction of balance of debt, except by written consent therefor by seller (Civ. Code, § 1524).

5. Compromise and settlement 🔑6(1)

Under conditional sale contract providing that seller may repossess automobile upon default by buyer, delivery of possession by buyer to seller without necessity of bringing suit therefor *held* inadequate consideration for seller's promise to cancel unpaid balance of purchase price.

6. Contracts 🔑75(1)

Consideration for agreement is not adequate when it is mere promise to perform that which promisor is already legally bound to do.

Appeal from Superior Court, Sutter County; Arthur Coats, Judge.

Suit by the General Motors Acceptance Corporation against Orville O. Brown. From a judgment for defendant, plaintiff appeals.

Reversed, with directions.

William S. Downing, of San Francisco, for appellant.

Loyd E. Hewitt, of Yuba City, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a judgment which was rendered against it in a suit for a deficiency due on the contract price of an automobile, which unpaid balance remained unsatisfied after the car had been repossessed and sold pursuant to the terms of the agreement and the proceeds thereof credited to the purchase price.

An automobile was sold and delivered to the defendant on a conditional sale contract for $1,952. Upon delivery of the car the sum of $500 was paid on the purchase price. The balance was to be paid in monthly installments of $50. The contract contains the following clause: "Title to said property shall not pass to the purchaser until said amount is fully paid in cash. * * * In the event the purchaser defaults on any payment due on this contract * * * the full amount shall, at the election of the seller, be immediately due and payable, and * * the seller * * * may take immediate possession of said property, without demand. * * * The seller may resell said property, so retaken, at public or private sale, without demand for performance, with or without notice to the purchaser. * * * From the proceeds of any such sale the seller may deduct all expenses, * * * The balance thereof shall be applied to the amount due; * * * in case of deficiency the purchaser shall pay the same with interest. * * * The seller shall have the right to enforce one or more remedies hereunder. * * * The terms hereof shall not operate to release the purchaser until full payment has been made in cash."

The defendant defaulted in the payment of several installments. By consent of the defendant the plaintiff took possession of the machine and resold it at private sale for the sum of $325, which sum was credited to the purchase price of the machine, leaving a deficiency on the purchase price of $430. Suit was commenced against the defendant for the last-mentioned sum, together with interest and attorney's fees, under the terms of the contract. The cause was tried by the court, sitting without a jury. The court found that the defendant had defaulted in his payments as alleged, but that "the agent of plaintiff had the authority to retake the car and cancel the indebtedness owed by the defendant to the plaintiff"; that upon repossessing the car the "plaintiff's agent then and there agreed to receive said automobile and cancel the obligation"; and that the defendant was therefore not indebted to the plaintiff. Thereupon judgment was rendered in favor of the defendant. From this judgment the plaintiff has appealed.

The appellant contends that the findings and judgment are not supported by the evidence, for the reasons that they are in direct conflict with the unambiguous terms of the contract, and that there is no evidence that plaintiff's agent had any authority to waive the express terms of the contract. The respondent asserts that the plaintiff had no legal right to repossess the machine or to hold the purchaser for any portion of the unpaid purchase price thereof. Respondent also asserts that plaintiff's agent specifically waived the right to maintain a suit for the unpaid portion of the purchase price of the car.

The findings and judgment are not supported by the evidence. The unambiguous terms of the contract for the sale of the automobile provides that the vendor may repossess the machine in the event of a default in any of the payments therefor, and resell the same at public or private sale, crediting the proceeds of such resale to the unpaid purchase price, and that the purchaser is not released from his obligations under the contract until he shall have paid the full amount of the purchase price as provided by the terms of the agreement. After default the machine was voluntarily delivered to the agent of the plaintiff and resold as authorized by the contract, leaving an unpaid balance of the purchase price amounting to $430, which is a valid obligation against the defendant according to the express terms of the contract.

[1] Under the express terms of a conditional sale contract a vendor of personal property has a legal right to repossess the property for default in the payment of stipulated installments of the purchase price thereof, and sell the property at either public or private sale, crediting the proceeds of such resale to the vendee, without waiving his claim to the balance of the purchase price which still remains unpaid. Matteson v. Equitable Mining & Milling Co., 143 Cal. 436, 77 P. 144; Jeanson v. Zangl, 119 Cal. App. 692, 7 P.(2d) 314; Smith v. Harrington, 41 Idaho, 155, 238 P. 530, 43 A. L. R. 1240; Estrich's Inst. Sales, p. 674, § 327.

There is a clear distinction between the facts of this case where the vendor under the terms of its conditional sale contract repossesses the property for default in the payment of installments for the purchase thereof, and resells the property, applying the proceeds to the indebtedness, and then sues for the unpaid portion of the purchase price, and those cases relied on by the respondent wherein the vendors either repossess and retain the property as their own, or leave the property in the possession of the vendee and sue for the entire deferred payments, or bring suits to rescind the contract. In the cases last mentioned, upon which the respondent relies, the courts have properly held that the conduct of the vendor constitutes an election of remedies, or a confirming of the title to the property in the vendee, under which circumstances the vendor is not entitled to subsequently repossess the property. In the present case the vendor merely took and resold the automobile as a pledge under the express terms of the contract and applied the proceeds of the resale to the payment of the debt, and then brought suit for the balance of the defendant's obligation. No fraud in the resale of the machine is charged. Under such circumstances it may not be said the vendor secures both the machine and the original selling price thereof. He merely recovers the original sale value of the automobile pursuant to the express terms of the contract.

[2] There is a conflict of evidence as to whether the agent of plaintiff agreed with the defendant in consideration of delivering possession of the machine to the vendor without the necessity of bringing suit therefor that the unpaid balance of the purchase price would be canceled and waived. The court, however, found that that agreement was made, and we are bound by this finding.

[3] There is, however, no evidence to support the assumption that the agent had authority to waive the express terms of the written contract which bound the defendant to pay the full contract price of the machine. The respondent asserts that the fact that the agent had authority to collect deferred installments of the purchase price, and, upon failure to pay them, to repossess the machine, shows that he also had authority to cancel and waive the unpaid balance. There is no other evidence tending to show that the agent had authority to waive the balance due on the purchase price. The agent's authority to collect deferred installments and in default of such payments to repossess the car is in exact accordance with the express terms of the contract. It furnishes no evidence of authority to waive the balance due in conflict with the express terms of the contract.

[4] Moreover, the obligation to pay the entire purchase price of the car could not be extinguished by an acceptance of part performance of the contract after a breach thereof, or a satisfaction of the balance of the debt, except by virtue of a written consent therefor by the creditor. Civ. Code, § 1524. No such written consent was given in the present case.

[5, 6] There was no consideration for the waiver of the obligation of the vendee in this case, for the reason that he merely voluntarily relinquished possession of the machine which he was legally bound to do under the express terms of the contract. It is an uniform rule of law that a consideration for an agreement is not adequate when it is a mere promise to perform that which the promisor is already legally bound to do. Benedict v. Greer-Robbins Co., 26 Cal. App. 468, 147 P. 486; Henry H. Cross Co. v. Prentice, 137 Cal. App. 497, 30 P.(2d) 1017; Sullivan v. Sullivan, 99 Cal. 187, 193, 33 P. 862; 6 R. C. L. p. 656, § 68; 13 Cor. Jur. p. 351, § 207; 1 Parsons on Contracts (9th Ed.) p. 474.

The judgment is reversed, and the court is directed to ascertain and render judgment for the amount of the balance due to the appellant under the terms of the contract.

We concur: PULLEN, P. J.; PLUMMER, J.

* * *

2 Cal.App.2d 477

BARTHELMESS v. CAVALIER et al.

Civ. 8841.

District Court of Appeal, Second District, Division 2, California.

Nov. 28, 1934.

As Modified on Denial of Rehearing Dec. 28, 1934.

Hearing Denied by Supreme Court Jan. 25, 1935.

1. Trial 🔑178

Power to direct verdict for defendants can be exercised only when there is no substantial evidence supporting verdict for plaintiff after giving his testimony its full scope and drawing therefrom all legitimate inferences favorable to him.

2. Trial 🔑139(1)

Trial court is not justified in directing verdict for defendants, unless no other reasonable conclusion is legally deducible from evidence, considered favorably to plaintiff, and different holding would be so lacking in evidentiary support that reviewing court would be impelled to reverse it or trial court to set it aside.

3. Trial ⇨178
In determining sufficiency of evidence to support verdict for plaintiff on defendants' motion for directed verdict, every presumption is in favor of plaintiff, who is entitled to have every proper inference favorable to his cause of action drawn from testimony.

4. Appeal and error ⇨989
Appellate court need not consider contradictions of facts shown by plaintiff's evidence on appeal from order denying defendants' motion for directed verdict, where such facts are not inherently improbable.

5. Brokers ⇨100
Stockbrokers' failure to perform duty devolving on them because of nonnegotiable character of stock certificates, accepted with corporate debentures in lieu of margin on customer's account, affected entire transaction, though some securities as to which different rule applied were used, in determining brokers' liability for conversion of securities; transaction not being severable.

6. Trial ⇨144
Motion by defendants for directed verdict or nonsuit does not lie, where evidence shows plaintiff's right to recover any amount, though less than amount prayed.

7. Principal and agent ⇨160½
Courts' tendency has been to protect person dealing in good faith with unfaithful agent misapplying principal's property, which he was authorized to handle, where it appears that he had actual power to perform acts for principal's benefit, though third party did not know of such power.

8. Bills and notes ⇨337
Purchaser of negotiable instrument need not make inquiry concerning its execution or consideration therefor to avoid implication of bad faith, unless there is something on face of instrument or circumstances surrounding its negotiation to arouse suspicion.

9. Bills and notes ⇨337
Buyer's mere knowledge of facts sufficient to put prudent person on inquiry concerning execution of or consideration for negotiable instrument purchased does not affect his position as bona fide purchaser; actual knowledge of invalidity thereof being required to establish bad faith, unless circumstances or suspicions are so cogent and obvious that continued passivity would amount to bad faith (Civ. Code, § 3137).

10. Sales ⇨234(3)
No one can transfer better title than he has, unless true owner is estopped to assert superior title.

11. Estoppel ⇨75
Pledges ⇨24
One intrusting his indicia of ownership of chattels to another is estopped to assert his ownership as against bona fide purchaser or pledgee for value (Civ. Code, §§ 2991, 3543).

12. Sales ⇨234(1)
Elements of bona fides in law of sales, aside from question of negotiability of instrument, are valuable consideration, absence of notice and presence of good faith.

13. Sales ⇨235(3)
Purchase is not made in good faith when facts and circumstances sufficient to excite suspicion and lead to inquiry exist.

14. Sales ⇨235(3)
Existence of facts calculated to put reasonable person on inquiry, coupled with duty to inquire, deprives person not making inquiry of position as bona fide purchaser.

15. Sales ⇨235(3)
Inquiry becomes buyer's duty when facts are inconsistent with perfect right in seller or facts of which purchaser should be aware are calculated to awaken suspicion.

16. Sales ⇨235(3)
Information even as to collateral facts, which would have led to buyer's discovery of ultimate facts had he pursued inquiry, is sufficient to charge him with knowledge of latter facts (Civ. Code, § 19).

17. Assignments ⇨102
Rule that purchaser of negotiable instrument need not make inquiry concerning its execution or consideration therefor to avoid imputation of bad faith is inapplicable to nonnegotiable instruments.

18. Corporations ⇨112
Stock certificates are not quasi-negotiable instruments exempt from application of doctrine of constructive notice to purchaser of ultimate facts, to discovery of which pursuit of inquiry suggested by facts known to him would have led, though title thereto passes by indorsement in blank and delivery of certificates.

19. Assignments ⇨102
Buyer of nonnegotiable instruments is not relieved of duty, imposed by circumstances, to inquire concerning their execution or consideration therefor in order to avoid imputation of bad faith.

20. Bills and notes ⚷537(6)

Existence of circumstances sufficient to put prudent man on inquiry as to execution of or consideration for even negotiable instruments may be sufficient to take to jury question of bad faith of purchaser thereof.

21. Brokers ⚷106

Whether brokerage firm acquired in good faith corporation stock and debentures, sold by it to liquidate marginal account of another than owner of such securities, *held* for jury in owner's action for conversion thereof.

22. Appeal and error ⚷927(7), 934(1)

In considering evidence on appeal from order denying defendants' motion for directed verdict and judgment notwithstanding verdict for plaintiff, every favorable inference fairly deducible and every favorable presumption fairly arising from evidence must be considered as facts proved in plaintiff's favor, evidence fairly susceptible of two constructions or several inferences must be viewed most favorably to him, and contradictory evidence must be disregarded.

23. Estoppel ⚷75

Payment of value and rule that one intrusting another with indicia of property ownership, through which innocent person is misled, must suffer consequences, are not sole criteria for determining validity of unauthorized transfers, but good faith must also exist.

24. Trial ⚷142

Directed verdict for defendants is improper when testimony is susceptible of different inferences, one of which is favorable to plaintiff.

◆

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Richard Barthelmess against William Cavalier and others, doing business under the firm name and style of Wm. Cavalier & Company, Gerald E. Arbuckle, and others. From an order denying defendants' motion for a directed verdict and judgment notwithstanding a verdict for plaintiff against all defendants except Arbuckle, defendants appeal.

Affirmed.

O'Melveny, Tuller & Myers, Pierce Works, and Jackson W. Chance, all of Los Angeles, for appellants.

Mott, Vallee & Grant and Kenneth E. Grant, all of Los Angeles, for respondent.

YANKWICH, Justice pro tem.

Under the provisions of section 629 of the Code of Civil Procedure, when a motion for judgment notwithstanding the verdict is made in the alternative—reserving the right to move for a new trial in case it is denied—the subsequent granting of a motion for a new trial cannot affect the right of appeal, given specifically by subdivision 2 of section 963 of Code Civ. Proc. We have such a situation here.

After the verdict of a jury in favor of the plaintiff and against all the defendants except Gerald E. Arbuckle, the trial court granted the motion of appellants for a new trial upon the ground of insufficiency of the evidence. It may be added, although the fact has no particular bearing upon the questions presented upon this appeal, that the court also granted the plaintiff's motion for a new trial as to the defendant Arbuckle. But appellants prosecute an appeal from the order of the court denying a motion for a directed verdict and for a judgment notwithstanding the verdict. It is obvious that the object sought by them is an order for a judgment in their favor. To this order they are entitled as of right, if the motion for a directed verdict should have been granted.

[1-3] The rendering of a judgment notwithstanding the verdict is made by section 629 of the Code of Civil Procedure to depend upon the existence of grounds for the granting of a motion for a directed verdict. See In re Estate of Fleming, 199 Cal. 750, 251 P. 637; Estate of Yale, 214 Cal. 115, 124, 4 P.(2d) 153, 156. The power to direct a verdict is as stated in Estate of Yale, supra, "touching the state of the evidence, the same as the right of the court to grant a nonsuit at the conclusion of the evidence." And the right is to be exercised only when, after giving to the testimony of the plaintiff its full scope and indulging in all favorable and legitimate inferences from it, there is no substantial evidence to support a verdict for the plaintiff. Estate of Caspar, 172 Cal. 147, 150, 155 P. 631; Estate of Flood, 217 Cal. 763, 768, 21 P.(2d) 579. "Unless it can be said as a matter of law that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury." Estate of

Lances, 216 Cal. 397, 400, 14 P.(2d) 768, 769. See Taylor v. Volfi, 86 Cal. App. 244, 260 P. 927, and Hellman v. Los Angeles Railway Corporation, 135 Cal. App. 627, 633, 27 P.(2d) 946, 28 P.(2d) 384. And in determining whether the evidence is legally sufficient every presumption is in favor of the plaintiff, and he is entitled to have drawn from the testimony every proper inference favorable to his cause of action. Berger v. Lane, 190 Cal. 443, 452, 213 P. 45; Singleton v. Hartford Fire Insurance Co., 105 Cal. App. 320, 326, 327, 287 P. 529.

The nature of the order appealed from requires a rather detailed discussion of the facts out of which the controversy arose. The action was for conversion of corporate shares and debentures of the value of $72,225, according to the allegations of the complaint. The verdict of the jury was for $62,672.91, in favor of the plaintiff and against all defendants excepting Arbuckle.

The plaintiff, Richard Barthelmess, is a motion picture actor. In August of 1930 Barthelmess had in his employ, as his secretary, Dallas S. Squire. Barthelmess and Squire had met in 1913, while they were both attending college. The friendship then formed resulted, in 1926, in the employment of Squire as secretary by Barthelmess. Barthelmess described his duties as consisting of making out checks for running expenses, keeping books for income tax purposes and of expenditures, carrying out instructions in regard to investments, communicating with brokers with regard to securities bought and sold, and taking care of deposits in banks. He denied that Squire was his business manager or that he took care of all his financial affairs. He stated positively that Squire "never without my consent or approval would purchase anything for me." On December 21, 1928, Barthelmess executed to Squire a power of attorney, giving and granting him the power, *in his name* and for *his use and benefit*, to exercise the almost all-embracing acts enumerated in a general power of attorney.

At the time of the transaction which formed the basis of the action, August 29, 1930, this power of attorney stood unrevoked. The relationship between Squire and his employer was of the friendliest. Barthelmess stated at the trial that he counted Squire his "closest friend." Barthelmess was the owner of 800 shares of the capital stock of Chapman Ice Cream Company, of bonds or debentures of the Platt Music Company in the amount of $25,000, and of 1,000 shares of the capital stock of Transamerica Company. These securities were on deposit with Frank P. Parish & Co., Limited, who were Barthelmess' brokers. Gerald D. Arbuckle, one of their salesmen, handled the Barthelmess securities, he having brought over the account from another house which had previously employed him. They stood in the account of Richard Barthelmess, and Arbuckle and Kennedy Boardman, resident partner and managing officer of Parish & Co. at Los Angeles, knew that the securities belonged to Barthelmess. At the time Parish & Co. were engaged in "pushing" a certain stock known as Missouri-Kansas Pipeline stock. Shortly before August 28, 1930, Arbuckle suggested to Squire that some of this stock be purchased for the account of Barthelmess. Squire would not agree. To induce the purchase Arbuckle stated that Boardman would guarantee the stock against loss up to 5,000 shares. Squire, however, still was of the view that it would not be a good investment for Barthelmess. However, he said that Barthelmess, who was out of the city, had stated before leaving that he might use some of his securities as collateral, if he were going to purchase any stock on his own account. He finally agreed to purchase as much, *for his own account*, as the Barthelmess securities held by Parish & Co. would purchase. Under date of August 26, Boardman, who was out of the city, telegraphed from Denver agreeing to guarantee "Barthelmess against loss" in exchange for one-half of the profit, also agreeing to divide the brokerage equally if the stock sold at a profit. Arbuckle then spoke to Oscar N. Srere, a customer's man employed by Wm. Cavalier & Co. Srere and Arbuckle knew each other, they having both been employed by another brokerage firm years before. Arbuckle spoke to him of the intended purchase of 2,500 shares, and the following was Srere's reaction to the suggestion, as narrated by him from the stand: "When I heard 2500 shares I said that I thought it better I took him back and let him speak to Mr. Harbach, who was in charge of the department. It was always a practice of ours anyway whenever a new account came into the office to take that account to Mr. Harbach, let him meet the account—let him meet the man or woman when present."

E. L. Harbach was a general partner of Cavalier & Co. The purchase of 2,500 shares was agreed upon, upon a margin basis, and the Platt debentures and the Chapman shares were accepted in lieu of the margin. It had been estimated that the purchase would have required $50,000 in cash. Arbuckle was introduced to Harbach as a salesman for Parish & Co. He told him that he was opening the account for Boardman, because Boardman was out of the city and was not there to open it personally. Harbach never made inquiries of Arbuckle as to the ownership of the securities. Arbuckle did not mention the name of either Barthelmess or Squire. It was understood that the purchase was to be strictly a margin purchase, to be held only for the duration of a pool then existing in the stock, and was to be closed when a profit had been realized. Arbuckle had never had any business transactions with Cavalier & Co. Upon learning that Arbuckle was a salesman for Parish & Co., Harbach insisted (in compliance with a rule of the New York Stock Exchange) that the permission of a resident partner be obtained to the trading by Arbuckle, and the latter thereupon dispatched a telegram to Boardman in Denver requesting the same. Boardman promptly replied giving the consent. In the meantime, through various sources, Harbach ascertained that Boardman was the resident partner and manager of Parish & Co. He also caused a credit inquiry to be made as to Arbuckle. But the report showed nothing specific about any ownership of property, other than that Arbuckle rented two houses and had a car—although there were no judgments, liens, or charges against him. This led Harbach to state at the trial that they "found out that he was all right from about five different sources." Harbach asked no questions of either Srere or Arbuckle as to the ownership of the securities.

After receipt of the Boardman consenting telegram, Arbuckle brought over the Platt debentures and Chapman shares. The Platt debentures were "bearer" bonds, not in the name of any one. The Chapman shares bore the "street name" (a term by which is designated the name of a person other than the owner, which is inserted for convenience of rapid trading) of Harold C. Carr, with the assignment properly executed by him and the signature guaranteed by Parish & Co., by Harold C. Carr. Carr was a cashier for Parish & Co. The transfer to his name had been made early in August at Squire's request, to facilitate the sale of the stock. When the securities were delivered they showed no ownership in Boardman, Barthelmess, or Arbuckle, and Harbach, saw them after they were delivered. As to the ownership of the securities Harbach made no investigation, and he testified that he did nothing more than to get the consent of Boardman to the opening of the account by Arbuckle. The securities were delivered on August 29. Between that date and September 8, 2,500 shares of stock were purchased by Cavalier & Co. An account was opened in Arbuckle's name on August 29 and the account was credited with the Platt debentures and the Chapman shares. Between August 28 and September 8, 2,500 shares were purchased, for which Cavalier & Co. advanced against the collateral of the Barthelmess securities $50,650. After Boardman's return to Los Angeles he confirmed (at the request of Cavalier & Co.), by letter dated September 10, the authorization for the opening of the Arbuckle account. At the time of the delivery of the letter a conversation took place between Boardman and Srere which is very significant. In this conversation Boardman told Srere that Arbuckle "was really acting for Mr. Squire, who was Barthelmess' agent," and that because Barthelmess and Squire, his agent, did not wish their names to appear in the transaction, it was to be kept "more or less confidential." The receipt of this information brought no comment from Srere, or inquiry as to where Arbuckle "got the securities."

By September 25 the Missouri-Kansas Pipeline stock had dropped considerably. Cavalier & Co. asked for additional collateral. Squire thought that Boardman should advance it, as he was to share in the profit. When Boardman failed to advance it, Arbuckle, upon Squire's authorization, delivered to Cavalier & Co. 1,000 shares of Transamerica stock, which were still held in the Barthelmess account with Parish & Co. These were also in a street name, duly assigned, and the assignment guaranteed both by Milton E. Giles Company and Parish & Co., by Carr. Additional collateral was called for on October 10 by Cavalier & Co. Arbuckle then told them that the account belonged to Squire and asked that it be transferred in his name, which was done October 16. The conversation concerning the transfer was had with Harbach. When informed by Arbuckle that the account was to be transferred to the name of Squire, Harbach (according to the testimony of Arbuckle) said: "Mr. Squire is the secretary for Mr. Barthelmess, isn't he, or handles Barthelmess' account, doesn't he?" To which Arbuckle replied: "Yes, that is the one." It may be inferred from this that Harbach knew at that time, that the account belonged to Squire and that the information which Boardman had given to Srere as early as September 10 had reached him. Otherwise his knowledge of the relationship between Squire and Barthelmess cannot be explained.

[4] A day or so later Squire informed Harbach that the securities were not his. On October 20 Cavalier & Co. telegraphed Bar-

thelmess, who was in New York, asking him to protect the account. Barthelmess replied: "Lloyd Wright attorney for Dallas Squire advises Barneson and Company will take over Squire account and I hereby consent and approve." The answer to this message was a refusal to transfer unless the actions of Squire were ratified, contained in a telegram which also informed Barthelmess of the transactions. The reply from Barthelmess, dated October 22, was: "If you hold any securities of mine it is without my knowledge or consent and I hereby demand their return to me." At the trial Barthelmess reiterated the statement contained in his last telegram, that Squire had no authority to use the securities for his own speculations. He denied having authorized such use before leaving Los Angeles, and stated that the first knowledge he had that the stock was being so used was upon receipt at New York of a letter written to him by Squire on October 14 and when he was asked to confirm such use by Cavalier & Co. Needless to say, Squire claimed that he was authorized; but as we are dealing with a motion for a directed verdict, we need not consider on this (or any other) point any of the contradictions to the foregoing facts, since the facts as outlined do not seem to us inherently improbable. No part of the money advanced was ever tendered to Cavalier & Co. Following the receipt of the Barthelmess demand they proceeded to liquidate the account through the sale of the securities. In this manner they reimbursed themselves for the money advanced. At the time of trial there remained in the account a credit of $43.04 and 93 shares of the Chapman stock.

We must now answer the following question: Do these facts (and the additional facts to be referred to in the course of the discussion to follow) show a conversion by Squire and the acquisition of the property by Cavalier & Co. under circumstances which would warrant a jury in inferring that they were not bona fide purchasers for value?

[5, 6] The stock certificates were not, at the time of the transaction, negotiable instruments. Powers v. Pacific Diesel Engine Co., 206 Cal. 334, 274 P. 512, 73 A. L. R. 1398. They have since been made such by the Uniform Stock Transfer Act. Civ. Code, § 330.22. We are also inclined to the view that the reference in the Platt debentures to conditions in other instruments were not of such character as to render them nonnegotiable. Stats. 1921, p. 471. But the question becomes unimportant. The transaction was not severable. If by reason of the nonnegotiable character of the stock certificates, a certain duty devolved upon Cavalier & Co. which they did not perform, their failure in this respect affects the entire transaction—notwithstanding the fact that some securities may have been used as to which a different rule might apply. This is particularly true when we are dealing with a motion for a directed verdict. For let us assume that by reason of the negotiable character of some of the securities, Cavalier & Co. were protected as to them. Plaintiff would still be entitled to recover the value of the Transamerica and Chapman shares. And a motion for a directed verdict does not lie, nor does a motion for a nonsuit, where the evidence shows a right to recover for any amount, even though it be less than the amount prayed for. Hancock v. Hubbell, 71 Cal. 537, 12 P. 618; Zellner v. Wassman, 184 Cal. 80, 193 P. 84; Martin v. Hall, 219 Cal. 334, 339, 26 P.(2d) 288; Tracy v. Stock Assurance Bureau, 132 Cal.App. 573, 581, 23 P. (2d) 41.

[7] In approaching the problem, it is to be borne in mind that it has been the tendency of courts to protect those dealing *in good faith* with an unfaithful agent, who, authorized to handle the property of his principal, has misapplied it—where it appeared that the agent had the actual power to perform the act, not for his own, but for the principal's benefit. Hambro v. Burnand, [1904] 2 K. B. 10; Hellmann v. Potter, 6 Cal. 13, 15.

And this irrespective of the fact that the third party dealing with the agent may not have known of the existence of the power. The fact of its existence, not the knowledge, serves the third party as a shield. Grange v. Judah Boas Co., 60 Cal. App. 484, 492, 213 P. 712; Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, 227 P. 723.

[8, 9] As to this, there is no disagreement between the parties to this appeal. The disagreement arises when we come to consider the elements of good faith. It is the contention of the appellants that "good faith" means the same thing whether applied to negotiable or to nonnegotiable instruments. It is, no doubt, the rule that when dealing with negotiable instruments—unless there be something upon the face of the instrument, or the circumstances surrounding its negotiation, to arouse suspicion—the purchaser is not called upon to make inquiry concerning its execution or the consideration for which it was given, under penalty of having "bad faith" imputed to him. And it may be stated as the accepted rule, at the present time, that mere knowledge of facts sufficient to put a prudent person

upon inquiry will not affect the position of one as a bona fide purchaser. More is required, actual knowledge unless "the circumstances or suspicions are so cogent and obvious that to remain passive would amount to bad faith." 8 Cor. Jur. 501.

[10, 11] This is the law in California. Civ. Code, § 3137; Popp v. Exchange Bank, 189 Cal. 296, 208 P. 113; Goodale v. Thorn, 199 Cal. 307, 249 P. 11; Security-First National Bank v. J. G. Ruddle Properties, Inc., 218 Cal. 435, 440, 23 P.(2d) 1016. Title, like a stream, cannot rise higher than its source. No one can, therefore, transfer a better title than he has, unless by the principle of estoppel the true owner is estopped to assert his superior title. One who has stolen a chattel cannot convey a good title, even to a bona fide purchaser. But the owner of chattels who has intrusted another with indicia of ownership is estopped from asserting his own ownership against a bona fide purchaser for value. This upon the assumption that where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer. Civ. Code, § 3543, 24 R. C. L. 373–379; Barstow v. Savage Mining Co., 64 Cal. 388, 1 P. 349, 49 Am. Rep. 705.

The rule applies to pledges under the specific provisions of our Code. Civ. Code, § 2991; Fowles v. National Bank of California, 167 Cal. 653, 663, 140 P. 271; Rapp v. Fred W. Hauger Motors Co., 77 Cal. App. 417, 422, 246 P. 1067.

[12, 13] The elements of bona fides in the law of sales, dissociated entirely from the question of negotiability, are: (1) A valuable consideration; (2) the absence of notice; and (3) the presence of good faith. Mayes v. Thompson, 128 Miss. 561, 573, 91 So. 275. And good faith is absent when facts and circumstances exist sufficient to excite suspicion and lead to inquiry. See 55 Cor. Jur. 601, 606; Rossman v. Ward, 210 Mich. 426, 430, 178 N. W. 41; Mayes v. Thompson, supra; Boyd v. Bearce, 48 Cal. App. 46, 50, 191 P. 560; Richlands Brick Corp. v. Hurst Hardware Co., 80 W. Va. 476, 479, 92 S. E. 685; Maxwell v. Brown Shoe Co., 114 Ala. 304, 310, 21 So. 1009.

[14-16] The existence of facts calculated to put a reasonable person upon inquiry, coupled with a duty to inquire, will, if not pursued, deprive a person of his position as a bona fide purchaser. And inquiry becomes a duty when the facts are inconsistent with a perfect right in him who proposes to sell. It also exists where the facts of which the purchaser should be aware are calculated to awaken suspicion. Of necessity, no definite rule can be formulated as to what, in a particular instance, is sufficient to arouse suspicion. But the better rule is that information even as to collateral facts which if pursued would have led to the discovery of the ultimate facts is sufficient to charge the person failing to pursue. 55 Cor. Jur. 605–615; 24 R. C. L. 385; 20 R. C. L. 346. See Ocean Shore R. Co. v. Spring Valley Water Co., 218 Cal. 86, 88, 21 P.(2d) 588; Rossman v. Ward, supra; see, also, Wilkerson v. Thorp, 128 Cal. 221, 224, 225, 60 P. 679. These principles are but an application and interpretation of the rule of constructive notice contained in section 19 of the Civil Code, which reads: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

[17] The justice of the rule is apparent. The law should (and does) protect honest dealing. But it should not protect him who is so credulous, as to close his eyes to signs of warning which, by ordinary prudence, should be heeded. When he fails to heed them, he may jeopard his position as (what might otherwise be) a bona fide purchaser. Because of the special nature of negotiable instruments—of the ease and universality with which such instruments are and have been transferred for many years in order to supply a rapid flow of credit—special protection has been thrown by statute and courts around those who deal in them. But in the absence of a statutory mandate, or the mandate of California precedent, there is no reason for applying the rule to nonnegotiable instruments so as to distinguish them from goods, chattels or choses in action—which are not protected by the rules of negotiability. See Standard Dredging Co. v. Title Insurance, etc., Co., 96 Cal. App. 93, 100, 273 P. 871.

[18] Appellants argue against the application of the harsh doctrine of constructive notice to sales of nonnegotiable securities. Because stock certificates have one attribute of negotiability, viz., the passing of title by endorsement in blank and delivery of the certificate, they would create a new classification for them, that of quasi-negotiable instruments. We know, however, of no authority which recognizes such classification. Nor do we think that the decisions of California courts dealing with bona fide purchasers warrant the conclusion that the test of "good

faith" in the case of nonnegotiable instruments is the same as in negotiable instruments.

Fowles v. National Bank of California, 167 Cal. 653, 140 P. 271, 275, involved an unauthorized pledge of stock by one who had possession and indicia of ownership. The trial court found that the pledgee took it in good faith and without notice. In sustaining the ruling the court said, at page 663 of 167 Cal., 140 P. 271: "We are satisfied that the conclusion of the lower court to the effect that the defendant took the stock in good faith, and without notice, cannot be held to be erroneous. There was no actual notice to it of circumstances sufficient to put a prudent man upon inquiry as to Miller's ownership thereof." It is apparent that the court recognized the application of the doctrine of constructive notice to such cases. It did so also in Northwestern Portland Cement Co. v. Atlantic Portland Cement Co., 174 Cal. 308, 313, 163 P. 47, 50, although it held there that the finding of bona fides was supported by the evidence and that a request for secrecy regarding the transaction was not "necessarily inconsistent with an honest purpose on the debtor's part, or good faith on that of the creditor."

In Popp v. Exchange Bank, 189 Cal. 296, 208 P. 113, the court after discussing the rule applicable to negotiable instruments determined that the bonds there under consideration were not negotiable. For that reason it held that no title had passed to the misappropriated bonds. In the statement of the rule the court used language which was broader than the state of the law warranted. See Powers v. Pacific Diesel Engine Co., 206 Cal. 334, 354, 274 P. 512, 73 A. L. R. 1398, in which the court held that the evidence did not warrant the finding of the trial court that the purchaser had not acted in good faith. Again, in People's State Bank v. Penello, 59 Cal. App. 174, 210 P. 432, 433, the court determined, as a question of fact, after a verdict, that the facts in the particular case did not warrant the conclusion that there were no bona fides in the pledge of several promissory notes as security. The opinion clearly recognized constructive notice as an element to be considered even in such a case. Mr. Justice Burnett, writing the opinion of the court, stated: "We think it equally plain that the only rational inference from the evidence is that plaintiff, in taking an assignment of said note, acted in good faith and without knowledge, *either actual or constructive*, of any defect in the consideration therefor." (Italics added.) Neither is there anything in Grange v. Judah Boas Company, 60 Cal. App. 484, 492, 213 P. 712, or in Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, 227 P. 723, which indicates that the courts in discussing the right of pledgees make the assertion of estoppel independent of the existence of good faith. Nor is there in them any indication that the duty to inquire is not an element of good faith.

[19] We conclude, therefore, that in dealing with instruments which are not negotiable the buyer will not be relieved of the duty to inquire, if the circumstances are such as to call for its exercise.

[20] But even in the case of negotiable instruments, the existence of the circumstances to which section 19 of the Civil Code refers may be evidence of bad faith sufficient to go before a jury. Bowman v. Metzger, 27 Or. 23, 39 P. 3, 44 P. 1090; Matlock v. Scheuerman, 51 Or. 49, 93 P. 823, 17 L. R. A. (N. S.) 747; Arnd v. Aylesworth, 145 Iowa 185, 123 N. W. 1000, 1002, 29 L. R. A. (N. S.) 638. The case last cited is especially in point. The question arose upon an appeal from an order directing a verdict in an action upon a promissory note, to which the defense of good faith had been pleaded. The court, while stating the general rule to be that mere failure to inquire will not affect the position of one as an innocent purchaser for value, and that there was uncontroverted testimony showing good faith, held nevertheless that because inferences inconsistent with good faith might have been drawn by the jury, there should have been no direction of a verdict. The court said: "It is quite possible that the testimony as a whole may be *insufficient to justify an affirmative finding* of bad faith on the part of the plaintiff, and *still not be so conclusive of his good faith as to require a withdrawal of the question from the jury.*" (Italics added.) See Canajoharie National Bank v. Diefendorf, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676. Similar language is found in Matlock v. Scheuerman, supra, and see Kipp v. Smith, 137 Wis. 234, 118 N. W. 848.

Because the authorities in the field of the law of sales are numerous, we have discussed in what precedes the doctrine of bona fides in relation to the law of sales. Of course, in the case at bar we are dealing with a pledge. But, as the discussion which precedes shows clearly, the principles just declared apply with equal force to pledges. More, no valid reason could be advanced for not so applying them.

[21, 22] We conclude, therefore, that the duty to inquire exists, and except where the evidence is legally conclusive upon the sub-

ject of good faith, it presents a question for the jury. And we are of the view that the circumstances surrounding the transaction in this case were such as to call for submission to the jury. The test of prudence is not subjective; it is objective. It postulates the existence of a criterion, upon the basis of common experience, which calls for action, under certain given circumstances, upon the part of prudent persons. We feel that the facts here presented were such as to justify the submission to the jury of the fact whether good faith existed. It is to be borne in mind that we are not dealing with the weight of evidence. In considering the evidence for the purpose of the order appealed from, the rules laid down in Berger v. Lane, 190 Cal. 443, 452, 213 P. 45, 49, must be brought into play. The court says: "Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence adduced must be considered as facts proved in favor of the plaintiffs. Where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the view most favorable to the plaintiffs. If contradictory evidence has been given, it must be disregarded. Estate of Arnold, 147 Cal. 583, 82 P. 252."

Appellants contend that as they could have relied upon the power of attorney, even if they did not know of its existence (Grange v. Judah Boas & Co., supra; Wenban Estate, Inc., v. Hewlett, supra), inquiry would have but led to that power, and it could well have stopped there. But we are not dealing here with a situation wherein a pledgee pleads actual authority. The transaction was not made in the name of the principal. The inquiry is not: What legal minimum would have satisfied the requirement to investigate? Nor is it: Might not the pledgee, upon discovering the true ownership, have been satisfied with the prima facie showing of the power? The question is rather: Would a prudent person, after opening a speculative, marginal account in the name of the salesman of a stock brokerage house which had but recently (three months before) opened an office in Los Angeles—a salesman who had no property of any value other than an automobile (although he was renting two houses)—upon discovering that the securities belonged to an undisclosed principal whose name was not mentioned at any stage of the transaction, and upon being shown the written authority to deal with the property, have stopped there? In such a situation, would not a prudent person have sought out the owner and inquired of him if the securities were being used with his consent? The inference is reasonable that a prudent person might have so acted and that these and other facts in the record warranted the submission of the question of good faith to the jury. The facts lent themselves to the reasonable inference that Cavalier & Co., in failing to do so, had not complied with the test of prudence and were not purchasers in good faith.

[23] It is true that Cavalier & Co. paid value; but that is one element only of bona fides. It is also true that he who intrusts another with indicia of ownership, through which an innocent person is misled, must suffer the consequences if through his action an innocent person is misled. But these are not the sole criteria for determining the validity of unauthorized transfers. The element of good faith must also exist. Without it the principles do not apply. And there were circumstances from which an inference of lack of good faith could have been inferred by the jury.

[24] A directed verdict is not proper when the testimony is susceptible of different inferences, one of which is favorable to the plaintiff. Hall v. Barber Door Co., 218 Cal. 412, 415, 23 P.(2d) 279; Berger v. Lane, supra; McClurken v. Ralph's Grocery Co., 130 Cal. App. 529, 530, 531, 20 P.(2d) 66. It follows that the motion for a directed verdict was properly denied, as was also the motion for judgment notwithstanding the verdict.

The order appealed from is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

In re OUNJUIAN'S ESTATE.*

HINES et al. v. MILLER.

Civ. 9960.

District Court of Appeal, Second District, Division 1, California.

Jan. 29, 1935.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

On rehearing.

Rehearing denied.

Prior opinion, see 39 P.(2d) 427.

Carlos S. Hardy, of Los Angeles, for appellant Albert P. Keck, guardian of Alea K. Ounjuian's Estate.

H. C. Veit and J. C. Shunk, both of Los Angeles, for appellant Frank T. Hines, adm'r of Veterans' Affairs, and United States Veterans' Administration.

Mills, Hunter & Dunn and C. R. Liljestrom, all of Los Angeles, for respondent.

PER CURIAM.

It is suggested by petitioner that in rendering our decision we failed to take into consideration a statute relating to deposit in banks, of money, held by bonded fiduciaries. Stats. 1915, p. 1438; Deering's Gen. Laws, 1931 Ed., Act 8317.

The agreement between the guardian and the surety, providing for deposit of the funds, and for joint control thereof, was not made according to the statute. It did not provide for the deposit of such funds "in such manner as to prevent the withdrawal of such money and assets or any part thereof, without the written consent of such surety or sureties, or an order of court, or a judge thereof, made on such notice to such surety or sureties as such court or judge may direct."

The petition for rehearing is denied.

* * *

3 Cal.App.2d 648

CARTER v. MONTEREY COUNTY TRUST & SAVINGS BANK et al.

Civ. 9370.

District Court of Appeal, First District, Division 1, California.

Jan. 17, 1935.

Rehearing Denied Feb. 16, 1935.

1. Escrows 🔑10

Vendor who breached his contract for sale of land by failing to dismiss prior trespass action against purchaser *held* not precluded from recovering balance of purchase price deposited in escrow because of breach, where judgment in trespass action was in favor of purchaser who stood on his rights under contract.

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*For subsequent opinion see 52 P.2d 220.

2. Judgment 🔑540

Doctrine of "res judicata" is one of repose, and rests on maxims that man should not be twice vexed for same cause, and that it is for public good that there be end of litigation.

[Ed. Note.—For other definitions of "Res Judicata," see Words & Phrases.]

3. Judgment 🔑540, 634

Fact or issue once finally determined on merits by court of competent jurisdiction may not again be put in issue in any subsequent litigation between same parties or their privies, but rule has no application in another or different litigation between other or different parties.

4. Judgment 🔑707

Finding in trespass action that agreement to dismiss such action was part of subsequent contract for sale of land by plaintiff to defendant, in that plaintiff breached agreement, *held* not res judicata so as to bar plaintiff from recovering from bank balance of purchase price which was deposited in escrow with bank.

5. Escrows 🔑10

In vendor's action to recover balance of purchase price deposited in escrow, allowance of damages to purchaser because of vendor's failure to dismiss prior trespass action against purchaser *held* improper, where no damage was pleaded or claimed and no evidence adduced on subject.

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Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by H. C. Carter against the Monterey County Trust & Savings Bank, Inc., and Thomas Lanigan. From a judgment, second named defendant appeals.

Cause remanded, with instructions to amend judgment, and, as amended, the judgment is affirmed.

Hankins & Hankins, of San Francisco, for appellant.

Harry L. Noland and Sisti Segretti, Jr., both of Salinas, for respondent.

JAMES, Justice pro tem.

For an understanding of the points made on this appeal and of our views thereon, a statement of the facts forming the background of the cause would seem to be convenient.

Appellant and respondent were neighboring landowners in the southern part of Monterey county. Disputes arose between them over the ranging of cattle on some of these lands, which resulted in a suit being filed by respondent herein against appellant for trespass damages. While this action was pending, negotiations were opened which finally culminated in an agreement between them whereby appellant agreed to buy respondent's land, consisting of some 320 acres, for the sum of $1,600. As appellant was procuring $960 of this sum through a loan from the veterans' welfare board, an escrow was created with the defendant bank for the purpose of conveniently consummating the transaction. In pursuance of these agreements, respondent, by appellant's direction, executed his deed of the premises to the veterans' welfare board and deposited it with the bank; and appellant deposited with the bank the balance of the purchase price above the welfare board's loan in the form of $440 cash and his promissory note for $200. In due course the deed was taken out and delivered to the welfare board, which paid over to respondent the sum of $960. Appellant then went into possession of the purchased lands. Respondent then went to the bank to get the balance of the purchase price, escrowed there by appellant, but the bank refused his demand because of a letter it had previously received from appellant. The letter, written some weeks after the escrow deposits had been made and addressed to the manager of the bank, contained the following directions, which are its only pertinent contents: "Am writing you this letter to instruct you not to deliver to Mr. H. C. Carter, of San Ardo, my check for $440.00, and my note for $200.00, until you receive notice from me that the suit brought by Mr. Carter against me has been settled to my satisfaction, in court or otherwise." The escrow deposits had been made some time in June; the letter was dated July 23d; the bank's refusal, above noted, was shortly after July 29th.

During all the time, the trespass action of Carter v. Lanigan had been pending, and it came on to trial on August 18th. On the day of the trial, Lanigan (appellant here) filed a supplemental answer in that case, in which he set up the agreement of purchase and sale under discussion; alleged his fulfillment of all of its terms, his payment of the purchase price, and his present ownership and possession of the lands; and further alleged that Carter (plaintiff in the trespass case, and respondent here) had agreed, as a part of the transaction, to dismiss the trespass action. He asked that Carter be estopped from maintaining the trespass action on these grounds;

but insisted on his own cross-action in that case for damages.

On the trial of the trespass action, the court found for Lanigan on the special defense set up in his supplemental answer; denied any damages to either party; and gave Lanigan judgment for his costs in the sum of $40.30. This judgment became final.

Thereafter, the escrow bank persisting in its refusal to deliver to Carter the balance of the purchase price still held by it, Carter commenced this action against the bank to recover the same. The appellant was made a nominal party, although no cause of action was stated against him, nor any relief demanded of him. The bank having failed to appear or answer, its default was duly entered. Appellant, however, appeared by a pleading denominated an answer, in which he sought affirmative relief against the plaintiff and the bank in the return to him of the escrowed $440 and promissory note for $200. Summons was issued on this pleading and duly served. The bank again defaulted.

In the affirmative matter set up by appellant in this pleading, he alleged the existence of the previous trespass action; the agreement between the parties by which respondent agreed to convey the 320 acres to appellant or to whatever party he might designate, and his own agreement to pay or cause to be paid therefor the sum of $1,600; the actual conveyance of the property by respondent to the veterans' welfare board at his (appellant's) direction; the payment by the welfare board to respondent of the sum of $960; the deposit by appellant with the escrow bank of the balance of the purchase price in the form of $440 cash and his promissory note for $200; and, further, that as part of said agreement respondent agreed to dismiss or cause to be dismissed the then pending trespass action. The pleading then goes on to allege that the deposit of the $440 cash and the $200 note were so deposited in escrow by appellant on the condition that they were to be delivered to respondent only on his dismissing or causing to be dismissed, the said trespass action. It is next alleged that respondent failed, refused, and neglected to dismiss said action; but caused the same to be prosecuted to a final judgment; and it set out the findings of the trial court in the trespass action, as hereinbefore noted. The pleading concludes with the allegations that appellant has fully performed the said agreement of sale; and that respondent has failed to do so, in that he failed to cause said trespass action to be dismissed. It may be noted also that in this answer appellant admits his continuous possession of the purchased premises and the retention by the escrow bank of the cash and note demanded; but he fails to allege any detriment suffered by him through the failure of respondent to dismiss the trespass action; and he likewise omits to state the final result of the trial of that action. It is interesting to note that he omitted mentioning the fact that he had in a cross-complaint for damages for alleged trespass, in the same action, filed long before the agreement of sale was made, and upon which that action was in part tried. These two latter omissions, however, were supplied on the trial of the present cause by the introduction in evidence of the judgment roll in the trespass action.

Under these circumstances the present action was tried; and a judgment was rendered by the court below that plaintiff (respondent here) recover from the defendant bank the $200 note of Lanigan and $399.70 of the $440 cash so escrowed. The latter sum was reduced to the allowed sum by deducting therefrom the sum of $40.30, which it was found was the detriment suffered by appellant by reason of respondent's failure to dismiss the trespass action.

From this judgment appellant appeals, presenting these somewhat novel points to support his appeal: (1) That respondent, having breached his contract by failing to dismiss the trespass action, is not entitled to enforce its terms in his own behalf; (2) that the findings of the court in the trespass action that the agreement to dismiss was a part of the contract, and that the respondent had breached the same, were res judicata on those matters and barred respondent of any relief herein. Several other points are presented on this appeal; but they are incidental to the stated questions.

[1] That the general rule is as stated by appellant may be conceded; but its application to the situation of the parties here would appear to be somewhat unreasonable. In the plea in bar which appellant urged to the trespass action, he asserted his full compliance with his part of the contract. His sole obligation under that contract was to pay the purchase price of $1,600. His allegation that he had fully performed was, in effect, an allegation that he had paid the $1,600. If he paid it, he parted with it. The consideration he was to receive was a conveyance of the lands and the dismissal of the trespass action. He had the conveyance and possession and enjoyment of the lands; and the trespass action is dismissed. True, the dismissal was not voluntary on the part of respondent, and took the form of a judgment

in appellant's favor; but the result was the same. And it was accomplished by appellant's own plea in bar and his demand for the enforcement of a controverted element of the contract. Having fully prevailed in his contentions, and having acquired and held all the considerations and advantages he claimed under the contract, he now seeks to recover a substantial part of the consideration which he alleged he had paid therefor. He would falsify, in this action, his assertion of full performance made in the trespass case. We know of no rule of law or principle of equity which would sustain him in such a course.

Given its widest range, appellant's grievance is nothing more than the difference, if there is any, between a voluntary dismissal of the trespass action, as agreed to, and the judgment therein, in his favor, obtained by his assertion of his right thereto under the contract. We can see no reason for him to complain of a situation produced by his own voluntary action. When respondent failed to dismiss, appellant had a number of courses open to him. He chose to stand on the contract and demand its performance in full. In effect, he sought and obtained, as far as he was concerned, a specific enforcement of the contract. Having done so, he cannot himself refuse to perform.

In passing this subject, we may pause to remark that a dismissal of the trespass action by the voluntary act of respondent may have been attended by some difficulty, in the presence of appellant's cross-complaint in that action, upon which he was apparently insisting.

The foregoing views would seem to render unnecessary any serious discussion of the second general ground of appeal; but, inasmuch as the subject has occupied so considerable a place in the briefs on file herein, we will give it our consideration.

[2-4] The doctrine of res judicata is one of repose. It rests on two maxims: "A man should not be twice vexed for the same cause," and "It is for the public good that there be an end of litigation." A fact or issue once finally determined on the merits by a court of competent jurisdiction may not again be put in issue in any subsequent litigation between the same parties or their privies. But the rule has no application in another or different litigation between other or different parties. In its very nature and design it is an armour of defense—not a weapon of attack. The adjudication here sought to be interposed as a bar to respondent's action was had in the trespass action between appellant and respondent. The instant case, as originally framed, was primarily one between respondent, as plaintiff, and the bank, as defendant; and the only relief sought was against the bank. Appellant was named as a defendant, but no cause of action was stated against him, and no relief demanded of him. He was not a necessary party to the action. In such case, the bank could not have availed itself of this defense; and neither was appellant in a position to do so. Respondent was not seeking to relitigate any issue with appellant. To the contrary, he was accepting the situation as made for him by appellant.

The invocation of the doctrine of res judicata can add nothing to appellant's position herein.

We have carefully considered the findings of the court below, in the light of appellant's contention that they are inconsistent; but can find therein no such inconsistency as would justify a reversal.

[5] Finally, appellant complains that the trial court was not justified in fixing the sum of $40.30 as damages suffered by him because of respondent's failure to dismiss the trespass action, and deducting that amount from the purchase price balance escrowed with the bank. He asserts that no such damage was pleaded or claimed, and no evidence adduced on the subject. In this contention we are convinced appellant is right.

The cause is remanded, with instructions to the court below to amend its judgment herein by increasing the amount of respondent's recovery in cash from the sum of $399.70 to the sum of $440; and, as amended, the judgment is affirmed. Respondent will recover his costs on appeal.

We concur: TYLER, P. J.; KNIGHT, J.

2 Cal.2d 80

SMUCKLER v. STATE BAR OF CALIFORNIA.

L. A. 14652, 14891.

Supreme Court of California.

Dec. 19, 1934.

Attorney and client ⚿58

Attorney who in one case for almost two years and more than two years in another case failed to account to client for money collected was suspended from the practice of law for two years and six months.

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In Bank.

Petition by Elijah M. Smuckler, an attorney, to review the action of the Board of Governors of the State Bar of California.

Petitioner suspended.

Andrew J. Copp, Jr., of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

As indicated by the numbers accompanying the title hereof, two proceedings against the petitioner were presented before two different local administrative committees of the State Bar; the first terminating in a recommendation by committee No. 3 that petitioner be suspended for a period of one year, which was reduced by the Board of Governors to a six months' period, and the second resulting in a recommendation by committee No. 9 that he be suspended for a period of two years to run consecutively with any other suspension, which latter recommendation was approved by the Board of Governors. The charges grow out of similar transactions, and the response of petitioner, as well as his version of the attending circumstances, is so nearly the same in each case that we have deemed it appropriate to consider the two causes together.

In the first proceeding the charges were that petitioner had violated rule No. 9 of the rules of professional conduct in two particulars as follows: (1) Commingling money belonging to his client with his own funds; and (2) failing to promptly report to his client the receipt of money belonging to him. The second charges the receipt of money by petitioner for his client and a failure to report its collection or to pay it over, but instead the use thereof by petitioner.

Before considering the facts relating to the specific charges, let us note certain facts common to both. Petitioner was admitted to practice law in March, 1923, but was employed at the time by the Title Insurance & Trust Company in its searching department, where he remained until some time in 1929, handling only a few professional matters during the hours he was not occupied in his regular work. During the year 1929, the title company adopted a policy requesting its employees to devote all of their time to its interests and to decline professional employment, as a result of which petitioner shortly after resigned his position and engaged in the practice of the law exclusively. During the time of his employment with the title company, the petitioner won and enjoyed an excellent reputation for honesty and reliability.

Adverting now to the particulars of the first charges, we find that petitioner was employed by the Sanford Holding Corporation of New York City to collect from David Mendoza a claim for rental in the sum of $624.99 upon the understanding that petitioner was to receive as compensation one-half of the amount actually realized. Two hundred and eight dollars was collected on August 13, 1930, and $279.17 on November 5, 1930. Action was commenced in the Los Angeles municipal court, but it does not appear that summons was ever served, and no judgment was secured. No further sums were paid by Mendoza. By reason of a contention on the part of Mendoza that he was only liable for two months' rental instead of three, the first check was held by petitioner until November 6, at which time both sums were deposited by petitioner's secretary in a trust account opened by petitioner for such funds on July 9, 1930. By an error of the bank, these sums were credited temporarily to Smuckler's personal account and the deposit slip placed among those belonging to the latter account. The error was corrected so far as credit was concerned on November 12, but the deposit slip remained among those of the personal account. On April 4, 1931, and again on July 30, 1931, the Sanford Holding Corporation inquired by letter concerning the status of the collection, but apparently the only information they were given was contained in a letter dated August 27, 1931, which petitioner says was written by his secretary without instructions from him, and which, according to the secretary, was signed by her, and in which it was said that action was commenced on October 10, 1930, and should

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes come to trial in November, 1931. Nothing more was done until along in May of 1932, at which time, Judge Pacht first spoke to petitioner, saying that he had had an inquiry concerning it from New York. Petitioner says that he looked for the file but that he could not locate it and did not find it until June 28, by reason of the fact that it had been inadvertently placed among what he termed "dead" files, and because, even there, it had been put under the letter "F" instead of "S." Furthermore, he did not discover the amount of the first collection until October, at which time he found a carbon copy of a letter between two long (usually termed legal size) papers. In this connection it should be noted that the deposit slip was not made out to carry the name of the client for whom the deposit was made, but only the number of the check. During May, 1932, the Sanford Holding Corporation referred the matter to an attorney who made demand upon petitioner for an accounting. On August 1, 1932, after two letters had been received from the attorney, petitioner forwarded him the sum of $140, or approximately one-half of the collection of $279.17, with the further statement that he recalled another payment the amount of which he had been unable to ascertain, and with the promise that as soon as he was able to determine the amount of the other collection he would remit the remainder. While accepting the sum as a credit, the attorney demanded a full statement of collections and a few days later, according to his testimony, at the suggestion of the Sanford Holding Corporation, wrote petitioner insisting upon payment of one-half the original claim together with $100 to compensate the attorney for his efforts. About November 2, 1932, in response to a telephone call from Raymond Tremaine, an examiner for the State Bar, petitioner called upon the former and related substantially the things testified to by him. At that time he offered Tremaine a check for $172.50, which, together with the sum of $140 already paid, would amount to one-half of the original claim without deducing costs for the filing of the action. On November 19 petitioner mailed this amount to the attorney. A copy of petitioner's account under the heading of Trust Account No. 2 was introduced and disclosed that there were many times after the deposit of the two sums collected when petitioner did not have a sufficient balance to pay the Sanford Holding Corporation $244, or one-half of the money actually collected by him, which fact the petitioner said in his testimony before the Board of Bar Governors was due to a mistake made by his secretary depositing $300 collected for another client in his personal account instead of in the trust account, and that he subsequently paid the latter client out of the latter account.

The local administrative committee found that petitioner had commingled his client's funds with his own and that he had failed to promptly report the receipt by him of the money belonging to his client, and that he "failed and neglected to pay to his said client the said sum so collected, or any part thereof." In view of other findings by the committee which set out in detail the payments we have already mentioned made by petitioner in 1932, we must construe the quoted portion of the finding to mean that petitioner did not promptly pay to his client the sums collected or any portion thereof. Thus construed, they are not inconsistent and are in keeping with the testimony. The Board of Governors approved the findings except to disapprove that one which said petitioner had commingled his client's funds with his own.

We may now turn to an examination of the evidence adduced in support of the charges in the second proceeding. During the latter part of 1929 and in the year 1930, Armino A. Campagna of New York City forwarded to petitioner two accounts for collection, one against Albert F. Gressler, upon which nothing was collected and which does not enter into consideration again except incidentally in connection with the files, and the other against Max Scheck in the sum of $1,004.60, the same being for rentals. On April 5, 1930, petitioner commenced an action against Scheck for the amount last mentioned, and pursuant to an assignment of the claim to Myrna Sallo, in the municipal court of Los Angeles. Just prior to May 1, 1930, petitioner agreed with counsel representing Scheck to compromise the claim upon payment by the latter of $600 in four equal monthly installments. This settlement was subsequently confirmed by the client upon the further understanding that petitioner should accept $200 as his compensation instead of the one-half previously agreed upon. Scheck paid as follows: May 3, 1930, $150; June 3, 1930, $150; and July 3, 1930, $150. The fourth and final payment was never made and, as a consequence, on October 7, 1930, petitioner took judgment against Scheck for the full amount of the claim less the sum of $450 paid thereon. The first installment was received by petitioner personally. The others were probably received by his secretary. All were deposited in petitioner's account at the bank. No evidence was introduced concerning whether the balance maintained in this account was sufficient at all times to pay the client the amount belonging to him. However, testimony was adduced tending to indicate that petitioner would have been loaned $450 at any time had he made application therefor. Nothing further was done about the matter until September, 1932, at which time Mr. Campagna wrote the Los Angeles Bar Association asking it to investigate. The letter was referred to the State Bar of California, and, in response to an inquiry by a representative of the latter, petitioner stated that he had not collected any money on the account but would secure and forward a certified copy of the judgment. Petitioner explains this statement by saying that the Gressler claim was received in 1930 from Campagna; that he made an investigation and reported it to be uncollectible; that he put the Gressler correspondence into the same file as the Scheck claim, thus covering up the latter; and that he had completely forgotten the collections. However, after the hearing in the first charges and after the severe illness which followed the recommendation of the administrative committee, and through the aid of the lawyer for Scheck and the assistance of the bank, petitioner, in the latter part of August, 1933, discovered the payments and on August 26, forwarded to his client one-half, or $225. This amount was not satisfactory to Campagna, who demanded an additional $75 by reason of petitioner's willingness to accept $200 out of the compromise figure of $600. Petitioner subsequently remitted the further sum of $75. It should be added that petitioner further excuses himself for not reporting immediately after the collections were made by saying that until the total sum of $600 was paid by Scheck it was uncertain whether his fee would be $200 or one-half of the amounts collected. It was upon the theory that one-half belonged to him that the first check to Campagna was only for $225.

The findings are not, when properly read, in conflict with the testimony set forth. The committee did conclude that "respondent knew said amounts were received by his office and that he deliberately refused to report the collection of said sums or otherwise reply to his client, with the intent of deliberately and wilfully converting said sums to his own use." It is difficult to understand upon any other basis how it was possible for petitioner to enter judgment in the action after first giving credit for the amount collected, especially in view of his personal settlement of the controversy and his personal collection of the first payment. It is impossible for us to believe petitioner was acting in good faith when he first reported to a representative of the State Bar that he had collected nothing on the account. Aside from this, however, petitioner's excuse that he did not report the collection of $450 because he was waiting for the final payment is not valid. His duty as a lawyer required him to report punctually. Acting in accordance with this mandate, he should have remitted at least the amount which was not questionable. Furthermore, it is not contradicted that in the present case he commingled the funds with his own. Considering the two cases together, it is manifest that petitioner has been lacking in that exactness and promptness which should characterize the conduct of attorneys when dealing with the money of their clients. Assuming that there was no deliberate attempt to convert the funds to his own use, it yet remains that he had been guilty of culpable negligence and carelessness. The primary purpose of disciplinary proceedings is not to punish the attorney, but to protect the public against the unfit, and to keep the profession wholesome. Can it be seriously argued that an attorney who, in two different cases, fails, for almost two years in the one and for more than two years in the other, to account to his client for moneys collected, is sufficiently aware of his responsibility to be intrusted to handle money for the members of the public? We think not. Some action must be taken to impress upon his mind that such conduct cannot be tolerated.

We have no doubt that petitioner has suffered acutely already. He points out to us by way of asking for leniency that immediately following the recommendation of the committee on the first charges he suffered a cerebral hemorrhage which confined him to the hospital and his home for about six weeks and which incapacitated him for sustained mental effort for months thereafter, and that, following the findings of the committee on the second charge, he was afflicted with coronary thrombosis which necessitated his stay in the hospital and his home for several months. The Board of Governors gave consideration to these evidences of excruciating physical and mental suffering. Yet they, in effect, recommended a suspension of two and one-half years on both charges in view of the fact that the latter was to run consecutively with any other suspension. We entertain no doubt that the afflictions of petitioner touched the sympathy of the members of that board as they do ours, but the question still remains whether the petitioner's regard for his professional responsibility entitles him to practice law. Were it not for the mitigating circumstances, we should feel compelled to permanently disbar him. As it is, we think the recommendation of the board should be adopted.

It is therefore the order that petitioner be suspended from the practice of the law for a period of two years and six months from and after the entry of this order.

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2 Cal.2d 60

E. J. CARROLL CO., Limited, v. INSURANCE COMMISSIONER et al.

S. F. 14866.

Supreme Court of California.
Dec. 14, 1934.

Appeal and error 🔑781(4)

Where appeal from orders granting injunctions requiring insurance commissioner to grant a renewal license to broker and restraining commissioner from interfering with broker's business had not been determined until one month after statutory term for renewal license had expired, issues became moot, and appeal would be dismissed, since injunctive orders could have no force after expiration of renewal license (Pol. Code, §§ 633a16, 633a22, 633b).

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In Bank.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by the E. J. Carroll Company, Limited, against the Insurance Commissioner and another. From an adverse judgment, defendants appeal.

Appeal dismissed.

Frank L. Guerena, of San Francisco, U. S. Webb, Atty. Gen., and Neil Cunningham, Deputy Atty. Gen., for appellants.

Joseph A. Brown, of San Francisco, for respondent.

PRESTON, Justice.

This appeal, submitted on a clerk's transcript and appellants' opening brief, presents moot questions, and hence will be dismissed.

Plaintiff, having been denied an insurance broker's renewal license for the period from July 1, 1932, to July 1, 1933, commenced this action against the state insurance commissioner and his deputy to obtain relief under section 633a22 of the Political Code. The prayer of the complaint was for judgment ordering issuance of said license to plaintiff for said period; also for an order to show cause, and, upon hearing thereof, for an interlocutory order providing for issuance to plaintiff of a license pendente lite, until final determination of the issues involved, and for general relief.

The court granted the order to show cause. On the return day defendants appeared and filed a general demurrer to the complaint, which was subsequently overruled; also an affidavit reciting in detail the reasons for refusal of the renewal license, to wit, that plaintiff was not properly qualified to act as an insurance broker, that it had violated the so-called anti-rebate law (section 633b, Pol. Code), and had attempted to place business with a company not authorized to do business in this state, in violation of section 596 of the Political Code. No counter affidavit was filed and no testimony taken. On November 23, 1932, the court made two orders. One was entitled "mandatory injunction," and it commanded defendants to forthwith issue to plaintiff a license as insurance broker, to remain in full force and effect until final determination of the action. The other order, entitled "injunction," restrained defendants, until final determination of the action, from in any way interfering with the conduct by plaintiff of its insurance brokerage business.

This appeal was taken by defendants from both of said orders. They contended that the complaint did not contain the requisites of a petition for review under said section 633a22, and that said orders were void because not predicated on the necessary showing. Furthermore, they refused to issue to plaintiff a license pendente lite, in compliance with the mandatory injunction, on the ground that the immediate filing of their appeal stayed its effect, if not the effect of both said injunctions (citing Ohaver v. Fenech, 206 Cal. 118, 273 P. 555, and cases therein noted).

Subsequently appellants were adjudged guilty of violation of said injunctions in a contempt proceeding wherein were raised many of the issues here involved. Upon review, however, the judgment of contempt was vacated upon the sole ground that there was no evidence in the record to support the finding that defendants had interfered with the conduct by plaintiff of its brokerage business in violation of said injunctions. Mitchell v. Superior Court, 132 Cal. App. 468, 23 P.(2d) 423.

Appellants had meanwhile secured from this court an extension of the time in which to file their opening brief herein to within fifteen days after final determination of said contempt proceedings. That case was finally determined on August 7, 1933, when petition for hearing by this court was denied. But it will be noted that the period covered by the renewal license for which plaintiff was applying expired more than a month prior to said decision, to wit, on July 1, 1933. Thus the issues here involved became moot.

One matter need be mentioned. The license ordered by the mandatory injunction was to be effective until the "final determination" of the action. At the time appellants' brief was filed said action had not yet been set for trial. However, in no event could the said injunctions be interpreted as affording plaintiff protection in doing business subsequent to July 1, 1933. Regardless of what the proper ruling may be on the issues presented by this appeal, or by the case on the merits, said injunctive orders, after July 1, 1933, could have no force or effect. This is true because the term of the license pendente lite could not be other or greater than the term for which the current license was sought, to wit, from July 1, 1932, to July 1, 1933, and also because section 633a16 of the Political Code expressly provides that the license of every insurance broker expires on July first of every year.

The appeal is dismissed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

2 Cal.2d 66

McCONNELL v. HERBERT et al.

L. A. 14877.

Supreme Court of California.

Dec. 17, 1934.

1. Corporations 🔑248

Agreement of mortgagee to forbear foreclosure if mortgagor would pay interest and installment on principal and if stockholders of mortgagor would give their note due at same time as installment for amount of installment provided for giving of note as additional security, and hence note was not discharged by application of proceeds of foreclosure sale to mortgage debt.

2. Guaranty 🔑36(6)

Stockholder of mortgagor who gave note to mortgagee as additional security to prevent foreclosure under deed of trust was chargeable with trustee's fees, sale expenses, and taxes advanced by mortgagee and secured by deed of trust, since contract of guaranty was made in relation to mortgage note and deed of trust.

In Bank.

Appeal from Superior Court, Los Angeles County; Ernest Weyand, Judge.

Action by Etta M. McConnell, an incompetent person, by Creed Wackman, her guardian, against F. W. Herbert, F. R. Cyriacks, and another. From a judgment for the plaintiff, the second named defendant appeals.

Affirmed.

Prior opinion, 32 P.(2d) 1088.

W. I. Gilbert, of Los Angeles, for appellant.

Moote & Longcroft, of Los Angeles, and Hinsdale, Otis & Johnson, of Sacramento (Robert W. Jennings, of Sacramento, of counsel), for respondent.

SHENK, Justice.

The plaintiff recovered a judgment against the defendants on a promissory note for $9,000 executed and delivered by the defendants to the plaintiff. From that judgment the defendant Cyriacks alone appealed.

The defendants resisted the action on the plea that the note had been discharged by the application of the proceeds of a sale under a deed of trust given to secure a note for $36,000, and as to which the note sued on was claimed by the plaintiff to have been delivered as additional security.

In July, 1922, the Auburn Creek Farms Company, of which the defendants, at the time of the execution of the $9,000 note, were the sole stockholders and directors, negotiated a loan from the plaintiff Etta M. McConnell. To secure repayment of the loan, the company executed its promissory note for $36,000 due in three years, and a deed of trust on land in Placer county. At the maturity of the note, the company defaulted, and in 1926 Mrs. McConnell proceeded to notice a sale of the property pursuant to the provisions of the deed of trust. In response to the company's request for postponement of the exercise of the power of sale under the deed of trust, Mrs. McConnell by letter dated May 27, 1926, made to it the following proposition:

"If you will pay on or before July 1st, 1926, the interest up to July 10th, 1926, and $1,000 on the principal, I will not proceed with the foreclosure of the Deed of Trust unless you make default in one of the following payments, that is to say: that you pay the semiannual instalment of interest due January 10, 1927, and that on or before July 1st, 1927, you pay $9,000 on the principal and the interest up to July 10th, 1927. In the meantime the $9,000 payment of July 1st, 1927, is to be covered by an individual joint and several promissory note of Mr. Herbert, Mr. Elliott, and Mr. Cyriacks, three of your stockholders, due on or before July 1st, 1927, with interest at 7 per cent., payable at maturity, and any payments made on the note to be credited on your indebtedness to me. Any payments made on the principal or interest on your indebtedness to me in the meantime, to be credited on the note of these three stockholders, except the July 1st, 1926, payment, and except that the interest of January 1st, 1927, if paid by you will pay interest on the $9,000 up to January 10th, 1927. If the $9,000 is paid on the principal and the interest paid on your notes on or before July 1st, 1927, then I will not enforce the foreclosure of said Deed of Trust before July 1st, 1928, unless you fail to pay the interest due in January, 1928.

"In other words,—I am offering to allow the note to stand without foreclosure if you pay $1,000 on the principal by July 1st, 1926, $9,000 on the principal on or before July 1st, 1927, and keep up the interest until July 1st, 1928, at which latter date I will expect the balance of the principal and interest."

The company made the cash payment of $1,000, and the defendants executed their note for $9,000 in compliance with the terms of the offer. On July 28, 1928, the $9,000 note remained unpaid, except a portion of the interest thereon as hereinafter noted. On that date the present action to recover the principal and interest due was filed. On August 3, 1928, the sum of $3,006.12 was paid on account of the note sued on. In June, 1929, the company being in default in the payment of its indebtedness to the plaintiff, the latter proceeded to carry out the provisions of the deed of trust for a sale of the property. At the sale held in November, 1929, the plaintiff was the purchaser of the property for the sum of $28,000.

The defendants filed amended answers to the complaint in the present action setting up the foregoing facts and pleading the discharge of the collateral note by the application thereto of the proceeds of the trustee's sale under the deed of trust. The court rendered judgment for the plaintiff for the principal sum of the note, less said sum of $3,006.12 paid on August 3, 1928, and interest thereon, less interest paid to January 10, 1927.

The appellant contends that the court erred in construing the terms of the letter of May 27, 1926; that the appropriate interpretation under the facts requires the application of the proceeds of the sale under the deed of trust to the discharge of the defendants' obligation on the $9,000 note.

[1] The construction which led the trial court to find that the $9,000 note was given as additional security in consideration of the forbearance by the plaintiff to proceed under the deed of trust must be upheld. The construction contended for by the appellant, viz., that payment on the original indebtedness, no matter from what source or when made, was contemplated by the terms of the letter to be considered as payment as well on the $9,000 note, would create the particular hazard and risk which it is obvious the taking of additional security was designed to prevent, and would render the transaction pursuant to the letter of May 27, 1926, meaningless. Furthermore, the interpretation sought by the appellant is expressly negatived by the statement in the letter that payments made on the $36,000 obligation "in the meantime," that is, prior to July 1, 1927, during which time sale proceedings were postponed, would be credited on the $9,000 note. It may not be gainsaid that the $9,000 note was therefore intended, as found by the trial court, to be given as additional security. There is no different or unusual element in the nature of the obligation added or involved by reason of the details contained in the letter of May 27, 1926. Under the terms thereof, the obligation of the makers of the $9,000 collateral note, after default in the payment of the secured indebtedness, is the same as that of a guarantor in any such transaction, i. e., of payment to the extent that the original security fails to discharge the obligation secured, not in excess of the principal sum guaranteed with the interest due thereon. The important factor in the present case is that the obligation under the

guaranty note was capable of being reduced by voluntary payments made on account of the principal indebtedness within the period specified. In fact, the appellant himself states that the letter "pursuant to which said $9,000 note was executed, is capable of but one interpretation, namely, that appellant thereby became a surety in the matter of the performance by said Auburn Creek Farms Company of its agreement to pay $9,000.00 on or before January 1, 1927, pursuant to said extension agreement." The appellant contends for a construction which would amount to a complete discharge of the $9,000 obligation if the defendants simply defaulted in the payment of the collateral note, and upon default of payment of the principal indebtedness permitted a sale to be made under the deed of trust. But the legal liabilities flowing from the contract are as stated herein, and not as contended by the appellant.

[2] It is claimed by the appellant that he should not be charged with the trustee's fees, sale expenses, and taxes advanced by the plaintiff and secured by the deed of trust, because, so it is said, his contract was to guarantee payment of the principal and interest of the $36,000 note only, to the extent of the amount of the undertaking, and that the contract of guaranty had no reference to the additional sums which might become due under the terms of the deed of trust. The appellant cites the case of Chinn v. Penn, 179 Cal. 153, 175 P. 687, wherein the result stated was reached pursuant to such a contract of guaranty. But the trial court in the present case was justified in taking the view that the appellant's contract was made in relation to the note and the deed of trust, rather than to the note alone as in the case relied upon. This must necessarily be so, inasmuch as the consideration for the contract of guaranty was the forbearance to proceed under the deed of trust.

The appellant also contends that he should have been credited with interest to January 10, 1929, instead of to January 10, 1927. The evidence shows that the $36,000 note was credited with voluntary payments of interest to January 10, 1929. The appellant under the express terms of the contract was entitled to credit only for interest on said $36,000 note paid to January 10, 1927, as found by the trial court.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

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2 Cal.2d 96

GOLAND et ux. v. PETER NOLAN & CO. et al.

L. A. 13090.

Supreme Court of California.

Dec. 21, 1934.

1. Malicious prosecution ⟹47

Count in complaint for malicious prosecution of attachment action *held* to state a cause of action.

2. Pleading ⟹218(2)

Order sustaining demurrer to count based upon stockholders' liability for malicious prosecution of attachment action *held* premature, where defendants were all sued by fictitious names and none had been served or had appeared.

3. Pleading ⟹204(2)

Complaint for malicious prosecution containing one or more appropriate items of injury was not subject to general demurrer, since other items, if too speculative or conjectural, might be treated as surplusage.

4. Malicious prosecution ⟹45

Complaint for malicious prosecution of attachment action was not subject to special demurrer on ground that plaintiff's wife was not proper party, where she was identified with property attached.

5. Pleading ⟹193(6)

Complaint for malicious prosecution of attachment action *held* not subject to special demurrer as containing two causes of action, one for prosecution and one for malicious attachment, where count clearly declared for malicious prosecution with attachment in aggravation of damages.

In Bank.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by H. Goland and wife against Peter Nolan & Co. and others. From a judgment for defendant corporation following an order sustaining, without leave to amend, a general and special demurrer to the second amended complaint, plaintiffs appeal.

Reversed, with direction.

Prior opinion, 33 P.(2d) 688.

Joe Wapner and Henry Cohen, both of Los Angeles, for appellants.

Freston & Files, of Los Angeles, for respondents.

PRESTON, Justice.

Plaintiffs appeal from a judgment for defendant corporation following an order sustaining, without leave to amend, a general and special demurrer to the second amended complaint.

[1, 2] This complaint is in two counts; the first for malicious prosecution of a civil action and the second upon stockholders' liability for the same cause of action. Count 1 states a cause of action. Count 2 is defective, and ordinarily we would sustain the ruling of the trial court as to it, but the defendants are all sued by fictitious names, and no one of them has been served with process or has appeared in the action. The ruling of the court on this count is therefore premature.

The first count recites that on June 8, 1928, the corporate defendant instituted in the superior court against plaintiff H. Goland an action for the sum of $6,000, and procured an attachment therein and levied it upon the interests of plaintiffs in certain described real property; that said attachment remained in force until May 12, 1930, when the action and the attachment were dismissed and withdrawn, ending the litigation in the equivalent of a judgment for plaintiffs.

[3] Said count 1 also recites that said claim was fictitious and known by said corporation to be such at all times, and that the suit was instituted and the attachment secured and levied without probable cause, maliciously, and with the design to injure, harass, and annoy plaintiffs; that, as a result of such action and such attachment, plaintiffs suffered various items of damages, to only two of which we need refer: First, that plaintiffs were purchasing the property levied upon, and had paid a deposit thereon of $5,000, pursuant to an escrow agreement, and by reason of the levy of said attachment they were unable to complete the purchase and lost the said deposit, to their damage in said sum; second, that punitive damages should be awarded. As to the other items of damages, it may be that on further consideration they will be found too speculative or conjectural to be the basis of relief, but, so long as one or more appropriate items of injury are found in the complaint, it is good as against a general demurrer, and other items, if objectionable, may be treated as surplusage.

[4, 5] Among the allegations of special demurrer are the following: That the wife of plaintiff is not a proper party, but we cannot see where this would injure defendants, as she is identified with the property on which the attachment was levied. The main special ground urged is that count 1 contains two causes of action, one for malicious prosecution and one for malicious attachment. This claim likewise is unfounded. The count is clearly one for malicious prosecution, with the attachment in aggravation of damages. A malicious attachment may be procured in an action instituted in good faith. Such a case was McCusker v. Walker, 77 Cal. 208, 19 P. 382. But it is often found that the action was prompted by malice and the attachment procured in furtherance of the malicious intent. This is the case here alleged, and it is supported by the following authority: Berson v. Ewing, 84 Cal. 89, 23 P. 1112.

The fact that the statute of limitations begins to run at the time of the levy in the first illustration and at the successful termination of the litigation in the other is not material here, in view of the classification we have made of the complaint.

The judgment is reversed, and as to count 1 the direction is made to overrule the demurrer.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.

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2 Cal.2d 63

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. PIERSON.

L. A. 14080.

Supreme Court of California.
Dec. 17, 1934.

1. Exemptions 🔑45

Saddles, bridles, packing equipment, etc., used on horses ridden by ranch owner and his employees in discharge of his duties as stock-raiser, *held* not exempt from execution as "implements of husbandry" (Code Civ. Proc. § 690, subd. 3).

[Ed. Note.—For other definitions of "Implements of Husbandry," see Words & Phrases.]

2. Exemptions 🔑45

Exemption statutes are liberally construed in case of doubt whether personalty is tool or implement exempted thereby, but not if it is within class of property or articles specifically mentioned in statute or quantity or number of articles declared exempt is expressly limited (Code Civ. Proc. § 690, subd. 3).

3. Exemptions ⚷4

Claim of exemption from execution of property in class specifically described or limited by exemption statute may not include more than declared limitation, as court cannot add to statutory list of exemptions (Code Civ. Proc. § 690, subd. 3).

4. Exemptions ⚷44

Statute exempting from execution two horses or two mules and their harness *held* to entitle ranch owner to exemption of only so many saddles, bridles, saddle blankets, etc., as would equip two such animals (Code Civ. Proc. § 690, subd. 3).

5. Exemptions ⚷44

Use of word "harness" in statute exempting from execution two horses or two mules and their harness *held* not to exclude saddles and similar equipment for two such animals, if customarily used or required by judgment debtor in his business of farming and stock-raising (Code Civ. Proc. § 690, subd. 3).

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In Bank.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by the Security-First National Bank of Los Angeles against George W. Pierson. From an order granting defendant's motion to discharge certain personalty from levy and seizure under a writ of execution to satisfy a deficiency judgment against defendant, plaintiff appeals.

Reversed.

For prior opinion, see 31 P.(2d) 437.

Barbour, Kellas & Backlund, of Fresno, for appellant.

N. Lindsay South, of Fresno, for respondent.

SHENK, Justice.

Fourteen saddles, nineteen bridles, fifteen saddle blankets, three hackamores, and packing equipment, of a value less than $1,000, were seized from the possession of the defendant under a writ of execution to satisfy a deficiency judgment against him. The defendant moved to discharge said personal property from the levy and seizure on the ground that it was exempt from execution pursuant to the provisions of section 690, subdivision 3, Code of Civil Procedure. The motion was granted, and the plaintiff prosecutes this appeal.

The only question to be determined is whether the trial court correctly decided that said personal property is of a character to entitle the defendant to the exemption under that section. The defendant is the owner and operator of a 1,500-acre ranch upon which he resides with his family. The acreage is devoted in part to vineyard, orchard, alfalfa, and grain. The defendant also raises cattle, and at the time of the levy there were about 84 head of cattle being cared for on the ranch. It is also shown that in the summer months the ranch was operated as a "Dude" ranch for the entertainment of paying guests. During that season horses, and the saddlery and equipment under seizure, were at the disposal of the guests for their use in horseback riding excursions, in the daily activities on the ranch and otherwise.

[1-3] Subdivision 3, section 690 of the Code of Civil Procedure provides that the following property is exempt from execution or attachment: "The farming utensils or implements of husbandry of the judgment debtor, not exceeding in value the sum of one thousand dollars; also two oxen or two horses or two mules, and their harness, one cart or buggy, and two wagons, and food for such oxen, horses or mules, for one month. * * *"

The defendant contends that the saddles, bridles, saddle blankets, packing equipment, etc., are implements of husbandry and therefore exempt from execution. He cites no authority to that effect, but it is claimed that this is so because the saddlery and equipment are used on horses which are ridden by the defendant and his employees in rounding up the cattle and otherwise in the discharge of the numerous activities and duties essential in the raising of stock on a 1,500-acre ranch.

No necessity arises for a discussion of the question whether husbandry includes stock-raising. We may assume that stock-raising is one of the many branches of agriculture or farming as defined by the authorities. McCue v. Tunstead, 65 Cal. 506, 507, 4 P. 510; Estate of Slade, 122 Cal. 434, 437, 55 P. 158; Simons v. Lovell, 7 Heisk. (54 Tenn. 419, 423), 510, 516; Dillard v. Webb, 55 Ala. 468, 474; 25 Cor. Jur. p. 10; 31 Cor. Jur. p. 232; 12 Cal. Jur. p. 335. Nor are we called upon to review the authorities, beyond referring to the case of Stanton v. French, 91 Cal. 274, 27 P. 657, 25 Am. St. Rep. 174, on the question whether, although personal property listed in the statute is sometimes hired out to others, the judgment debtor is entitled to claim the exemption if, as it is shown by the record to be the

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

case, it is customarily used by him in the conduct of the business of farming and stock-raising. We may assume the answer in the affirmative. Nevertheless we are unable to perceive that the defendant has brought himself within the exemption. It may be true, as contended by him, that a liberal policy should govern as to what is to be considered an "implement of husbandry," as that term is used in an exemption statute. See In re Estate of McManus, 87 Cal. 292, 25 P. 413, 10 L. R. A. 567, 22 Am. St. Rep. 250; Estate of Klemp, 119 Cal. 41, 50 P. 1062, 39 L. R. A. 340, 63 Am. St. Rep. 69; Spence v. Smith, 121 Cal. 536, 53 P. 653, 933, 66 Am. St. Rep. 62. Considering the beneficent and humane purpose of exemption statutes, such a policy of liberal construction may be said to apply when there is doubt whether the particular personal property is a tool or implement. A different rule of construction is indicated when the personal property comes within the class of property or articles specifically mentioned in the statute, or the quantity or number of specified articles declared to be exempt is expressly limited. The court may not make additions to the statutory list of exemptions. Consequently, if the defendant's property is of a class which is so specifically described or limited, his claim of exemption may not include more than the declared limitation. Pacific Bank v. Robinson, 57 Cal. 520, 522, 40 Am. Rep. 120; Stanton v. French, 91 Cal. 274, 27 P. 657, 25 Am. St. Rep. 174; Estate of Brown, 123 Cal. 399, 401, 55 P. 1055, 69 Am. St. Rep. 74; Crown Laundry & Cleaning Co. v. Cameron, 39 Cal. App. 617, 179 P. 525; Roberts v. Frank Carrithers & Bros., 180 Ky. 315, 202 S. W. 659, 660; 25 Cor. Jur. pp. 57, 90; 12 Cal. Jur. 332.

[4, 5] It therefore becomes unnecessary to determine the question whether the saddles, bridles, etc., are implements of husbandry. Certainly, following the defendant's argument, they are not such implements by themselves and apart from their function of equipping animals employed in farming and stock-raising operations. Furthermore, we may say that they are not such implements in the light of the language used in said subdivision 3. The words "horses or * * * mules, and their harness" have been used by the Legislature as opposed in meaning to the words "farming utensils or implements of husbandry," and therefore as not intended to be included as implements of husbandry. Had the express differentiation not been made, the defendant's argument might be entitled to some weight. However, inasmuch as the exemption which a judgment debtor may claim under said subdivision is expressly limited to "two horses or two mules," it follows that the defendant was entitled to retain only so much of the property seized as will equip two animals. In this connection we are of the opinion that the word "harness" has sufficient flexibility to permit a conclusion that the Legislature did not intend, by its use, to exclude saddles and similar equipment for two animals if they are customarily used or required by the judgment debtor in the business of farming and stock-raising.

The order is reversed.

We concur: WASTE, C. J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

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3 Cal.App.2d 282

FOLSOM v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 9876.

District Court of Appeal, Second District, Division 2, California.

Dec. 21, 1934.

Hearing Denied by Supreme Court Feb. 18, 1935.

1. Master and servant 🔑387

Widow of bridge construction superintendent, unnecessarily entering trench, excavated for pilings, in disregard of his employer's orders to take no chances, if there was any danger, *held* not entitled to extra compensation on ground of employer's misconduct in failing to brace side walls of trench.

2. Master and servant 🔑417(5)

Questions as to procedural error of Industrial Accident Commission require no consideration in certiorari proceeding to review commission's award.

Proceeding by Florence Grace Folsom for a writ of certiorari to review an award of the Industrial Accident Commission denying petitioner extra compensation for the death of her husband, Frederick J. Folsom, while employed by George H. Oswald and another, doing business as Oswald Bros., a copartnership.

Award affirmed.

Ralph G. Lindstrom and Arthur H. Glanz, both of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondent commission.

George D. Blair, of Los Angeles, for respondent Oswald Bros.

SCOTT, Justice pro tem.

Frederick J. Folsom, husband of petitioner, was killed by a cave-in of a ditch while employed by respondent Oswald Bros. An award to the widow was made in the sum of $5,000, which is not contested. Respondent commission refused to award an additional $2,500 sought by petitioner for alleged serious and willful misconduct by employer, and found that "the evidence does not establish that said injury was caused by the serious and wilful misconduct of the employers, a copartnership, or the managing representative or general superintendent thereof." Petitioner in this proceeding questions the jurisdiction of respondent commission to make such finding and award, and alleges that evidence is lacking to support it.

[1] For some time prior to his death, deceased, an experienced bridge builder, had been working for Oswald Bros. as superintendent, had been laid off, and was recalled to take charge of the construction of a bridge as foreman or superintendent. Trenches 12 or more feet deep were dug by a "clam shell" and drag line, piling was set up, and the dirt filled in. The evidence indicated that it was not feasible to place material to "shore" or "brace" the side walls during the excavating operations. Being more than four feet in depth, the "Trench Construction Safety Orders" issued by respondent commission required this protective bracing. The failure to protect the trench is the basis of petitioner's claim for extra compensation.

Deceased was in charge of the work, with instructions "not to take any chances, to take all their jacks and timbers, and if there was any danger, not to take any chances." To excavate and place the piling and complete the operation it was unnecessary for any one to enter the trench. Folsom disregarded his employer's orders, and, acting without attention to the very obvious danger, went into the trench, where he met his death. Under such circumstances (Ethel D. Co. v. Industrial Accident Commission, 219 Cal. 699, 28 P.(2d) 919), and under the definition set out in E. Clemens Horst Co. v. Industrial Accident Commission, 184 Cal. 180, 193 P. 105, 16 A. L. R. 611, respondent commission properly decided that his dependent was not entitled to the extraordinary award which she here seeks to recover, but is limited to the amount already allowed.

[2] Other questions raised as to alleged procedural error require no consideration in a proceeding in certiorari. 4 Cal. Jur. 1030, § 14.

Award affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

3 Cal.App.2d 238

BANK OF AMERICA v. SANCHEZ et al.

Civ. 8885.

District Court of Appeal, Second District, Division 2, California.
Dec. 20, 1934.

Hearing Denied by Supreme Court
Feb. 18, 1935.

1. Fraud ⇨58(1)

Fraud must be proved by clear satisfactory evidence.

2. Bills and notes ⇨537(4)

In action on note, where evidence regarding payee's fraud was conflicting, weight thereof *held* for court in trial without jury.

3. Appeal and error ⇨1010(1)

Finding on substantial evidence in trial without jury cannot be disturbed on appeal.

4. Contracts ⇨94(7)

Generally, deception concerning matters of law does not constitute "fraud" as ground for rescinding contract.

[Ed. Note.—For other definitions of "Fraud," see Words & Phrases.]

5. Contracts ⇨94(7)

Rule that misrepresentation of law does not justify rescission of contract for fraud has exception where parties occupy confidential or fiduciary relations, whether legal, moral, social, domestic, or merely personal (Civ. Code, § 1572).

6. Contracts ⇨94(7)

Rule that misrepresentation of law does not justify rescission of contract for fraud has exception where one party, having superior means of information, possesses knowledge of law and thereby gains unconscionable advantage (Civ. Code, § 1572).

7. Bills and notes ⟹520

In action against husband and wife on note, evidence of wife's business relations with payee bank for several years, and of her acquaintance with and confidence in bank's officers, and of escrow officer's superior knowledge of law, sustained finding in trial without jury as to fraud in representing that although her signature was necessary, she would not be personally liable, and showed "actual fraud" within statute (Civ. Code, § 1572).

[Ed. Note.—For other definitions of "Actual Fraud," see Words & Phrases.]

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Appeal from Superior Court, Los Angeles County; R. Morgan Galbreth, Judge.

Action by the Bank of America, a state banking corporation, against Juan C. Sanchez and wife. A default judgment was entered against defendant named, and from a judgment in favor of the wife, plaintiff appeals.

Affirmed.

Hearing denied by Supreme Court; PRESTON, J., dissenting.

Louis Ferrari, of San Francisco, and Edmund Nelson and Howard Waterman, both of Los Angeles, for appellant.

Thomas C. Ridgway and James A. Miller, both of Los Angeles, for respondent.

WILLIS, Justice pro tem.

Appellant, plaintiff below, as successor in interest of First National Trust & Savings Bank of Whittier, sued to recover a deficiency on a note, after sale under the trust deed securing the same. The defendant makers were husband and wife, and the property described in the trust deed was found by the trial court to be separate property of the husband. The note in question was given in 1928 to the Whittier bank in the sum of $25,600, on the husband's application for a loan, to liquidate previous indebtedness of the husband to that bank, $12,500 of which was evidenced by notes secured by liens on part of the same property and signed by both husband and wife, the balance being unsecured indebtedness of the husband. At the time of signing the note in question, the makers were living separate and apart and were shortly thereafter divorced. On appropriate pleadings, with prayer by respondent herein to reform the note by striking her name therefrom, and after the evidence was in and the cause submitted, the court found that in the transaction no cash was paid to respondent nor other thing of value delivered to her personally (finding XI); that at the time the note was executed, the Whittier bank represented to respondent, Mrs. Sanchez, that since she was still the legal wife of Juan C. Sanchez, although separated from him, her signature was necessary upon the note and trust deed in order to make said loan valid and in order to secure the payment of same with a lien upon the property of Juan C. Sanchez, and that she would not be personally liable for said indebtedness if she signed said note and trust deed (finding XII); that prior thereto, respondent had done business with the Whittier bank and knew the officers of said bank and had confidence in their statements and representations, and by reason thereof she believed in the representations so made and relied thereon and was induced and persuaded thereby and signed said note; that had it not been for said representations, she would not have signed said note (finding XIII); that said representations were false and untrue and were made fraudulently and with intent and for the purpose of securing her name upon said note (finding XIV); that said signing of said note by respondent was through a mistake of law; that said mistake arose from a misapprehension of the law by respondent, in that she was advised by the bank and believed it was necessary, in order to secure the payment of said indebtedness with the property of Juan C. Sanchez, that she sign her name to said note, when as a matter of law such was not necessary; and that the bank was aware at the time that respondent had such misapprehension of the law but did not rectify the same (finding XV).

Upon these findings the court concluded that respondent was not liable or indebted on said note and was entitled to have the note reformed by striking her name therefrom and to judgment in her favor for costs. The default of defendant Juan C. Sanchez for failure to appear and answer having been taken, judgment was accordingly entered against him for $18,464.57 and interest, being the amount of the deficiency, and to reform the note by striking respondent's name therefrom, and in her favor for costs. It is from the latter portion of such judgment in favor of respondent that this appeal is prosecuted.

Appellant contends: (1) That the evidence is insufficient under the law to sustain the findings of fraud and mistake of law; (2) that misrepresentation of law is not basis for fraud; and (3) that the escrow officer of the payee bank had no authority to bind the bank by a promise of nonliability.

This last point is predicated on a premise which is nonexistent. There is neither evidence nor finding in the record to support the assumption that a promise of nonliability was made by the bank officer. What he stated was declaratory and not promissory, and consisted in a representation on his part that respondent would not be liable for the indebtedness if, as wife of the borrower, she signed the note along with the trust deed. That feature of the case constitutes part of the basis of the fraud alleged and found, and must be considered only in connection with that problem.

[1-3] Mindful of the rule that fraud must always be proved by clear and satisfactory evidence, we have examined the record herein, in view of appellant's first contention, and find therein substantial evidence tending to prove that the representations were made as found by the trial court, and that as a result thereof the mistake of law arose and existed at the time respondent signed the note in question. Respondent gave positive testimony as to the making of the representations as found by the court, her belief thereof, and her reliance thereon. There was a partial corroboration by her husband. Opposed to this testimony was that of the escrow officer to the effect that he did not remember any such representations having been made by him; that nothing was said about nonresponsibility, but that he did tell respondent that the bank required her to sign the note and trust deed. This at most only results in a conflict. Fraud being an issue, it was for the trial court to determine the weight of the evidence; and if there was any substantial evidence tending to prove fraud, it was for the trial court to determine whether such evidence outweighed or preponderated over that adduced in opposition thereto. When the trial court has found that such evidence does so preponderate, its decision thereon is final, and an appellate court has no right or authority to disturb such a finding. Noll v. Baida, 202 Cal. 98, 259 P. 433; Divani v. Donovan, 214 Cal. 447, 6 P.(2d) 247.

This leaves for determination appellant's other contention, namely, that misrepresentation of law is not basis for fraud. Restated in a logical and condensed form, the findings establish this proposition: That by means of the misrepresentations of law by the bank officer, respondent was led into a misapprehension of the law, and as a result was induced to sign her name to the note in question. It thus appears that the primary cause in the transaction was the misrepresentation of law by the bank officer, and the ultimate effect was respondent's act of signing the note. This reduces the element of mistake of law to an intermediate position, as part of the chain from cause to effect, and deprives it of the quality or character of a separate and distinct ground of voiding the contract evidenced by the note. The mistake of law was a constituent and integral part of the fraud alleged and found, and must be so considered and allocated in determining this case.

[4-6] It is undoubtedly the general rule that deception as to matters of law does not amount to fraud and will not furnish a ground for the rescission of a contract. But this rule, like many others in law, has its exceptions. One most commonly known and recognized arises in such cases and avoids the rule where the parties to the contract occupy confidential or fiduciary relations; another similarly arises with like effect where one who has had superior means of information possesses a knowledge of the law and thereby gains an unconscionable advantage of another who is ignorant and has not been in a situation to become informed. In either of these cases the injured party is entitled to relief, and in the latter case the right to relief is predicated on the same ground as if the misrepresentations of law were matters of fact. Champion v. Woods, 79 Cal. 17, 21 P. 534, 12 Am. St. Rep. 126.

The first exception above noted is not limited to those cases in which there exist confidential or fiduciary relations in the strict sense of those terms as ordinarily understood to apply to persons in various legal relations in which the law imports a fiduciary relationship, but has been extended to every possible case in which a fiduciary relation exists as a fact. Such relation need not be legal; it may be moral, social, domestic, or merely personal. Robbins v. Law, 48 Cal. App. 555, 192 P. 118. It has been many times held by our appellate courts that to entitle one to relief on the ground of fraud, it is sufficient to show the existence of such friendly relations during a period of several years between the parties as would entitle the injured person to place confidence in the integrity and honesty of the other party to a contract and in the truth of whatever representations the latter made to the former with regard to the transaction between them. Scovill v. Guy, 205 Cal. 386, 270 P. 934, and cases therein cited.

[7] The evidence herein shows that the parties did not occupy any of the conventional or statutory relations which are declared to be fiduciary. Nor do the facts herein show the existence of such confidential relations as would bring this case within the provisions of section 2219 of the Civil Code, defining what constitutes trusteeship. But there is substantial evidence of respondent's previous business relations with the bank over a period of years in the matter of signing notes and other papers; of her husband's former employment therein; and of her acquaintance with, and confidence in, the officers of the bank. There is also evidence supporting the inference that the escrow officer of the bank, having had many years' experience in the matter of real estate titles and of loans to married persons involving real estate security, had had a source and means of information as to the law affecting the rights and fixing the obligations of married persons far superior to that of respondent, who, under the proofs herein, was chiefly engaged in managing her home and taking care of her children; and that notwithstanding the legal presumption of knowledge of the law, the evidence creates the inference that she was in fact ignorant of the intricacies of the law relating to community and separate property of spouses when used as security, and the rights and duties in respect thereto. And there is, furthermore, a reasonable and justifiable inference from all the evidence touching the transaction in question that respondent had been, and was held at the time of signing, in a situation such as to prevent her from becoming better informed. These several elements combined go to make a case fairly within the limits of both exceptions above noted; and the trial court having found on substantial evidence the existence thereof, and the relations giving rise to confidence, and having further found that the representations were false and fraudulent and were made with intent to induce respondent to enter into the contract, actual fraud, as defined by section 1572 of the Civil Code, is established and respondent is entitled to assert the same as a defense to the action on the note.

We find no merit in appellant's claim that certain portions of the findings, other than those hereinabove reviewed, are unsupported by or are opposed to the evidence. We have considered them in the light of appellant's contentions, and note that the portions referred to relate to incidental or detail matters which do not affect the question of fraud upon which the relief herein was founded.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

2 Cal.App.2d 684

CHAMBERLAIN v. CHAMBERLAIN.

Civ. 1521.

District Court of Appeal, Fourth District, California.

Dec. 7, 1934.

1. Evidence 🔑589

In divorce action, testimony of husband to overcome presumption that title to certain land was in husband and wife as joint tenants in accordance with plain language of deeds *held* not controlling on trial court, even though not contradicted.

2. Husband and wife 🔑14(3)

In divorce action, deeds and agreement of sale of real property *held* to create presumption that legal title was in husband and wife as joint tenants, in accordance with plain language of deeds.

3. Appeal and error 🔑1011(1)

Finding attacked for lack of evidentiary support must be upheld on conflicting evidence.

4. Husband and wife 🔑254

Personal property purchased with funds derived from real property held by husband and wife in joint tenancy was impressed with same character of ownership as real property, and finding in divorce action that it was community property was error.

Appeal from Superior Court, Los Angeles County; Georgia Bullock, Judge.

Action by Valera Chamberlain against Leo R. Chamberlain. Judgment for plaintiff, and defendant appeals.

Reversed in part, and affirmed in part, with directions.

Lawrence Paul Scherb, of Culver City, for appellant.

Joseph Mayer, of Los Angeles, for respondent.

JENNINGS, Justice.

Plaintiff instituted this action against her husband for the purpose of securing a decree of divorce. In her amended complaint she alleged that certain real property therein described had been conveyed to her and the defendant as joint tenants after their marriage, and that certain described personal property was community property. The prayer of the pleading was for a dissolution of the marriage and for a division of the community property in such manner as the court might justly decide. Upon the conclusion of the trial the court found that all facts alleged in plaintiff's amended complaint were true, that she was entitled to a decree of divorce from defendant, that she had a joint interest with defendant in the real property described in the amended complaint, and that she was entitled to a half interest in the community property described in the amended complaint. In accordance with these findings an interlocutory judgment of divorce was entered wherein it was adjudged that plaintiff was entitled to a divorce, and it was ordered that the community property "as set forth in plaintiff's amended complaint be divided equally between plaintiff and defendant." It was further adjudged that the plaintiff and defendant each have an equal half interest in the real property described in plaintiff's amended complaint. From the decree thus made and entered the defendant has prosecuted this appeal. Although the notice of appeal given by the defendant specifies that the appeal is taken from the whole of the judgment, no attack is made upon that part of the decree whereby the court adjudged that plaintiff is entitled to a divorce from the defendant, the attack being limited to those portions of the decree whereby it is adjudged that plaintiff has an undivided one-half interest in the real property, and that the community property described in the amended complaint shall be divided equally between the parties.

[1, 2] In support of the appeal it is first contended that the trial court's finding that respondent has a joint interest with appellant in the real property is entirely lacking in evidentiary support, and that the decree in so far as it adjudged that each party to the action has an equal half interest in such real property is therefore erroneous.

Examination of the record herein indicates that the evidence with respect to the ownership of the real property which was presented to the trial court was conflicting. In support of the finding of joint tenancy certain documentary evidence was produced. This evidence consisted of a grant deed, an agreement for the sale of real estate, and a bargain and sale deed. The first of the abovementioned documents was executed subsequent to the marriage of appellant and respondent. By this deed Nathan Horn and his wife conveyed an undivided one-half interest in the land to T. N. Boner and Fannie Boner, as joint tenants, and the remaining undivided half-interest to L. R. Chamberlain and Valera Chamberlain, his wife, as joint tenants. The second instrument was executed on April 14, 1925, between T. N. Boner and Fannie Boner, denominated the "seller" and L. R. Chamberlain and Valera Chamberlain designated as the "buyer." By it T. N. Boner and Fannie Boner agreed to sell and convey to L. R. Chamberlain and Valera Chamberlain an undivided one-half interest in the real property and to execute and deliver to the last-named parties "a good and sufficient deed of grant, bargain and sale to them as joint tenants with the right of survivorship." The third instrument was a bargain and sale deed which was executed on August 10, 1926. By this deed, T. N. Boner and Fannie Boner granted and conveyed to L. R. Chamberlain and Valera Chamberlain, husband and wife, as joint tenants, and not as tenants in common, and to the survivor of them an undivided one-half interest in the real property.

To offset the effect of the above-described evidence, appellant offered his own testimony, the substance of which was that he did not understand the legal effect of the instruments and did not intend that respondent should thereby acquire any interest in the real property the purchase price of which was paid entirely from his own separate funds, and that respondent had agreed that she would convey her interest in the property at any time he so desired.

It is appellant's contention that his testimony, as above outlined was not contradicted in any material respect, that it therefore established a prima facie case in his favor and should have been controlling upon the trial court.

[3] With this contention we cannot agree. Concededly, the legal effect of the above-mentioned documentary evidence produced by respondent was to establish that respondent and appellant owned the real property in joint tenancy. Certainly, if no evidence other than these instruments had been submitted, the trial court could not have properly decided other than it did. Appellant's testi-

mony was introduced to rebut the legal effect of the documentary evidence produced by plaintiff. However, the trial court was not obliged to accept the explanation offered by appellant and to decide that it overcame the legal effect of the deeds and of the agreement for the sale of the property. Respondent's documentary evidence created a presumption that the legal title to the property was in respondent and appellant as joint tenants in accordance with the plain language of the deeds. Appellant sought to overcome this presumption by the testimony which he himself offered. It remained for the trier of facts to decide whether the proof offered by appellant was sufficient to overthrow the presumption. People v. Milner, 122 Cal. 171, 179, 54 P. 833; Pabst v. Shearer, 172 Cal. 239, 242, 156 P. 466; Thompson v. Davis, 172 Cal. 491, 157 P. 595. It is obvious that the principle which is here applicable is the very common principle which requires that a finding of a trial court attacked for lack of evidentiary support must be upheld if the evidence respecting the facts specified in the finding is conflicting. Finally, it may be observed that, although appellant confidently asserts that the testimony upon which he relies was in no material respect contradicted, it does not impress us as being so clear and convincing of itself as to impel the conclusion that it should have been accepted as a correct explanation by the trial court.

[4] Appellant also attacks the trial court's finding that the personal property described in the amended complaint and alleged to be community property was community property. The ground of this attack is likewise lack of evidentiary support.

The personal property mentioned in the amended complaint consisted of an automobile, furniture, a leasehold interest in a pool hall including certain equipment, and an unknown amount of cash. The evidence which related to the money showed that appellant and respondent originally had a joint bank account from which respondent drew the sum of $1,500 at the time the parties separated, and that there then remained in said joint account approximately $2,000, all of which had been expended at the time of trial, and that appellant then had no bank account of any character and was possessed of no funds. As to the other personal property, the record indicates that all of it was purchased by appellant after his marriage to respondent, and that the purchase price paid therefor was derived from rentals realized from the real property, which, as above noted, had been conveyed to the parties in joint tenancy. It is apparent that this property which was purchased with funds derived from real property held by the parties in joint tenancy was impressed with the same character of ownership as the real property which furnished the purchase price therefor. In re Estate of Harris, 169 Cal. 725, 147 P. 967; In re Kessler, 217 Cal. 32, 17 P.(2d) 117. The trial court erred in finding that it was community property and in disposing of it as such in the decree.

That portion of the decree which orders equal division of the above-mentioned personal property between the parties on the basis that it is community property is therefore reversed. In all other respects the judgment from which this appeal has been taken is affirmed. Upon the going down of the remittitur herein the trial court is directed to correct its findings and to modify the decree in accordance with the views which are herein expressed and to make disposition of the above-mentioned personal property in accordance with law. Each party shall bear his or her own costs on appeal.

We concur: BARNARD, P. J.; MARKS, J.

3 Cal.App.2d 56

MUTUAL BUILDING & LOAN ASS'N OF LONG BEACH v. CORUM.

Civ. 9618.

District Court of Appeal, First District, Division 2, California.

Dec. 14, 1934.

Hearing Denied by Supreme Court Feb. 11, 1935.

1. Appeal and error ⚷685

Defendant in ejectment could not complain that trial court took issues from jury as being equitable, where judgment roll did not disclose that all issues were not submitted, and, if issues were equitable, defendant was not entitled as matter of right to jury trial thereon.

2. Mortgages ⚷390

Holder of note secured by trust deed *held* not precluded from maintaining ejectment for failure to pay installments due, on ground that holder was limited to remedy provided by statute, where statute did not create new right, but merely provided new remedy which was cumulative and not exclusive (Code Civ. Proc. § 1161a, subd. 3).

◆

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by the Mutual Building and Loan Association of Long Beach, a corporation, against Augusta Corum. Judgment for plaintiff, and defendant appeals.

Affirmed.

Alfred J. Hennessy, K. B. Dawson, and George D. Collins, Jr., all of San Francisco, for appellant.

Jones & Douglas, of San Jose, and Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

STURTEVANT, Justice.

From a judgment in favor of plaintiff in an action in ejectment the defendant appealed, and has brought up the judgment roll.

The complaint was drawn in the ordinary form. In her amended answer the defendant pleaded many denials, and then set forth an affirmative defense. From that affirmative defense it appears: That heretofore the defendant was the owner in fee of the lands involved; that the plaintiff held a trust deed as security for the payment of a promissory note in the sum of $65,000 payable in monthly installments of $455 per month for one year after November 21, 1925, and then $788.50 per month, together with interest at the rate of 8.4 per cent. per annum on deferred payments; that on July 19, 1929, a notice of sale was given; that the notice was not signed by the payee of the note, nor by any of the trustees; that the notice recited interest for the months of April, May, and June of 1929 had not been paid; that, after the notice was given, the installments of interest were paid to, and accepted by, the plaintiff, and that such act on its part constituted a waiver of the notice theretofore given; that nevertheless, on the 4th day of April, 1930, the sale was had pursuant to the terms of said notice, and plaintiff became the purchaser; that the trust deed provided, if default be made in the payment of principal or interest. the beneficiary might consider said note, and all debts, moneys, and dues secured thereby, as immediately due and payable, and might record a notice of the breach and of its election to cause said property to be sold to satisfy said obligations; but, it is alleged, no notice of the election on the part of the beneficiary so provided for was ever given. The judgment roll discloses that the jury brought in a verdict: "We, the jury in the above entitled cause, find in favor of the plaintiff for the restoration of the land and premises described in the complaint on file herein." That verdict was dated September 22, 1931. The judgment roll also discloses that on October 2, 1931, the trial court made findings of fact on the affirmative allegations hereinabove referred to, and in the closing paragraph the findings recited: "Let judgment be entered in accordance with the foregoing and in accordance with the verdict of the jury." On the same date a judgment was signed by the trial judge, and it was filed and entered.

[1] In her first point the defendant asserts that the issues presented by the pleadings are legal and not equitable issues of fact, and that the trial court committed reversible error in taking these issues from the jury as being equitable and not legal issues of fact and determining them by findings and thereby depriving the defendant of her constitutional right to a jury trial. The answer to that contention is twofold. In the first place there is nothing contained in the judgment roll that indicates that all issues were not submitted to the jury. In support of the judgment we must presume that they were. The other answer is that the affirmative allegations either were or were not equitable issues. If they were equitable issues, then the defendant was not entitled as a matter of right to a jury trial thereon. If they were not equitable issues, then the defendant was

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

entitled to a jury trial thereon, and, as we have stated above, there is nothing in the record that shows she did not have one.

[2] In her second point the defendant asserts that the right of the plaintiff was to maintain an action under subdivision 3 of section 1161a of the Code of Civil Procedure, and that it had no right to maintain an action in ejectment. She bases the point on what is said in 1 California Jurisprudence, 381, 382: "It is a well settled principle that where a right is given and a remedy provided by statute * * * the remedy so provided must be pursued." The vice in that contention is that section 1161a of the Code of Civil Procedure did not create a new right, but merely provided a new remedy. Under such circumstances the new remedy will be treated as cumulative and not as exclusive. 1 C. J., p. 990.

In view of the conclusions which we have reached on the points just discussed, it is unnecessary to consider other points presented by the defendant.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

2 Cal.App.2d 635

GOODPASTOR v. CARY.

Civ. 8099.

District Court of Appeal, Second District, Division 1, California.

Dec. 6, 1934.

Hearing Denied by Supreme Court Feb. 4, 1935.

1. Venue 🔑52(1)

Granting motion for change of venue for convenience of witnesses rests largely in trial court's discretion (Code Civ. Proc. § 397, subd. 3).

2. Appeal and error 🔑965

Trial court's exercise of discretion on motion for change of venue for convenience of witnesses will not be disturbed on appeal, in absence of showing of abuse of discretion (Code Civ. Proc. § 397, subd. 3).

3. Venue 🔑52(1)

Refusal of plaintiff's motion in malpractice action to change place of trial for convenience of witnesses *held* not abuse of discretion, where defendant's affidavit showed that nine physicians residing in county to which defendant had venue changed would testify as to defendant's exercise of skill usually possessed by physicians in vicinity (Code Civ. Proc. § 397, subd. 3).

◆

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Myrtle Goodpastor against L. W. Cary. Defendant's motion for change of venue was granted, and from an order denying plaintiff's motion to change the place of trial, plaintiff appeals.

Affirmed.

Marvin B. Sherwin, of Oakland, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

HOUSER, Justice.

Appeal from an order denying plaintiff's motion for a change of venue from Los Angeles county to the county of Alameda upon the ground of convenience of witnesses. The complaint filed in Alameda county, the residence of plaintiff, states an assumed cause of action for malpractice arising out of the relationship of physician and patient, committed in the city of Huntington Park, Los Angeles county. Defendant's motion for a change of venue from the county of Alameda to the county of Los Angeles, his place of residence, was granted. After answer had been filed by defendant, plaintiff filed her motion for change of place of trial to Alameda county. She now appeals from the order denying said motion.

The complaint charged that in the city of Huntington Park, state of California, during the months of February, March, and April, 1930, defendant treated plaintiff for an ailment affecting her mouth and throat. During all said time plaintiff was a resident of Huntington Park. At the same time, defendant resided there, and still resides there.

Plaintiff's motion was based upon subdivision 3 of section 397 of the Code of Civil Procedure, which, in substance, provides that the court may, on motion, change the place of trial "when the convenience of witnesses and the ends of justice would be promoted by the change." The motion for change of place of trial was supported by affidavits of plaintiff and of her counsel. In opposition to such affidavits, defendant filed an affidavit made by his counsel wherein was set forth the respective names and addresses of nine physicians practicing in and about the city of Huntington Park, together with the statement "that the said and foregoing physicians and surgeons will testify that they are familiar with the degree of care and skill usually rendered in and about the locality of Huntington Park, Los Angeles county, California, and that in their opinion and in the opinion of all of them, that the matters and things done by defendant in the course of treatment followed and recommended by him conform to that degree of care and skill usually possessed and rendered by physicians and surgeons in good standing in the community of Huntington Park who are practicing under similar circumstances."

[1-3] It is a general rule that the granting of a motion for change of venue that is grounded on the convenience of witnesses rests largely in the discretion of the trial court, the exercise of which will not be disturbed on appeal in the absence of a showing of its abuse. Wrin v. Ohlandt, 213 Cal. 158, 1 P.(2d) 991, and authorities there cited.

Considering the issues raised by the pleadings, and especially the defense indicated by the testimony proposed to be given by the nine physicians, to which reference hereinbefore has been had, this court is of the opinion that in making the order in question no abuse of discretion was committed by the trial court.

The order is affirmed.

We concur: CONREY, P. J.; YORK, J.

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3 Cal.App.2d 53

Ex parte FERRARI.

Cr. 1824.

District Court of Appeal, First District, Division 2, California.

Dec. 14, 1934.

Intoxicating liquors 🔑215

Complaint charging defendant with misdemeanor by unlawfully selling whisky, but making no attempt to allege that sale complained of was sale of broken package or sale of whisky to be drunk on premises, *held* not to state offense (St. 1933, p. 1697).

Application by Harry Ferrari for a writ of habeas corpus.

Petitioner ordered discharged.

W. E. Foley and John D. Foley, both of San Jose, for petitioner.

Fred L. Thomas, Dist. Atty., and Frank J. Waterhouse, Deputy Dist. Atty., both of San Jose, for the People.

STURTEVANT, Justice.

A complaint was filed against the petitioner in the justice's court of San Jose township, Santa Clara county, purporting to charge a violation of State Liquor Control Act, St. 1933, c. 658, p. 1697. He was arrested and tried before the court, a jury having been waived. The trial court found him guilty and entered a judgment of conviction. The petitioner appealed to the superior court, and the judgment was affirmed. Thereafter he applied to this court for a writ of habeas corpus claiming that the trial court exceeded its jurisdiction.

The complaint alleges that "* * * on or about the 14th day of May, A. D. 1934, a misdemeanor, towit, a violation of the State Liquor Control Act, was committed by Harry Ferrari, defendant, as follows, towit: The said defendant did, at the time and place aforesaid, wilfully, and unlawfully sell certain intoxicating liquor towit, whisky which said sale of intoxicating liquor was then and there prohibited and unlawful. * * *" It is conceded that, under the provisions of the statute, sales of whisky may be made legally. But it is claimed by the district attorney that it is unlawful to sell whisky in broken packages or to be consumed on the premises where the sale is made. However, no attempt was made to allege that the sale complained of was the sale of a broken package or that the sale was made of whisky to be drunk on the premises. In other words, the complaint is consistent with the innocence of the petitioner to the same extent that it is with his guilt. In the case of Ex parte Greenall, 153 Cal. 767, 96 P. 804, the court was called upon to construe a pleading which attempted to allege a violation of the Medical Act, St. 1907, p. 252. There, as here, the question arose as to whether the pleading purported to state a cause of action. On page 770 of 153 Cal., 96 P. 804, 806, Mr. Justice Angellotti, writing the opinion of the court, said: "As we read the act, the allegations of the complaint in the justice's court in this case are entirely consistent with the innocence of the defendant of any violation of its provisions. It therefore fails to show a public offense."

In the case entitled In re Culver, 187 Cal. 437, at page 439, 202 P. 661, 662, the court said: "It is true, as petitioner contends, that it is a settled rule in habeas corpus proceedings that a court may determine whether or not a complaint in a justice's court in a criminal proceeding states facts sufficient to constitute a public offense. Ex parte Kearny, 55 Cal. 212; Ex parte Greenall, 153 Cal. 767, 770, 96 P. 804; Matter of Ah Sing, 156 Cal. 349, 104 P. 448." In the case of In re Garbarini, 129 Cal. App. 618, 19 P.(2d) 27, the District Court of Appeal for the Third District was called upon to determine the same question with reference to a complaint purporting to plead a violation of section 626e of the Penal Code. Mr. Presiding Justice Pullen made a most thorough examination of the decisions in which the question was involved whether the pleading was sufficient or insufficient to withstand an attack under a claim that a justice's court had exceeded its jurisdiction by basing its judgment thereon. On page 626 of 129 Cal. App., 19 P.(2d) 27, 30, he stated the conclusion of the court as follows: "Counsel for petitioner clearly indicate the vice of the complaint by stating that the complaint as filed charges that petitioner 'did wilfully and unlawfully kill a doe.' In view of the definition of 'doe,' that allegation is equivalent to charging that defendant 'did wilfully and unlawfully kill a female deer, or a female antelope, or a female hare, or a female rabbit, or a female kangaroo,' and reduced to its ultimate absurdity the charge is that defendant 'did wilfully and unlawfully kill an animal.' We cannot say that such a complaint would charge a public offense. Such construction would violate the rule that a complaint must not only be consistent with the theory of guilt of the accused but must be inconsistent with the theory of his innocence. People v. Eppinger, 105 Cal. 39, 38 P. 538; People v. Lamanuzzi, 77 Cal. App. 301, 246 P. 557; In re Capanna, 45 Cal. App. 501, 187 P. 1077." Thereafter a petition for a rehearing was presented, but it was denied. Later an application to the Supreme Court asking that court for a hearing was also denied. It therefore appears that the complaint filed against the petitioner did not state a public offense, and that he should be discharged.

It is so ordered.

We concur: NOURSE, P. J.; SPENCE, J.

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2 Cal.App.2d 743

PEOPLE v. CLARK.

Cr. 2582.

District Court of Appeal, Second District, Division 1, California.

Dec. 11, 1934.

1. **Criminal law** 🔑739(2)

Question of alibi in robbery trial was for jury.

2. **Criminal law** 🔑1159(5)

Appellate court cannot interfere with jury's finding against defendant as to alibi on contradictory evidence after proper instructions.

3. **Robbery** 🔑24(1)

Evidence *held* sufficient to support conviction of robbery.

4. **Criminal law** 🔑304(2)

Court may take judicial notice of fact of political history that civil works administration was established to provide work for indigent persons (Code Civ. Proc. § 1875, subd. 8).

5. **Criminal law** 🔑404(4)

Money found concealed in defendant's garage after alleged robbery and his statements to police officers respecting it *held* admissible in evidence.

◆

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Thomas R. Clark was convicted of robbery, and he appeals.

Affirmed.

Paul E. Tapley, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

YORK, Justice.

The defendant was accused by an information, containing two counts, of the crime of robbery and of the crime of kidnapping for the purpose of robbery. The jury brought in a verdict of guilty of the crime of robbery and a verdict of not guilty as to the crime of kidnapping for the purpose of robbery. This appeal is from the judgment and from the order denying defendant's motion for new trial.

The facts in this case are to the effect that a collector for the Safeway Grocery Company, at about the hour of 12 o'clock noon, on January 10, 1934, was making his rounds in a Chevrolet coupé and had in the car $750, mostly in cash; that as he drove east on Foothill boulevard near Baldwin avenue just south of Sierra Madre, he was held up by two men driving a Ford car; that the passenger in the Ford car leveled a gun at him, demanding that he pull his car off the road and stop; that the robber then got into the Chevrolet car with the collector and ordered the latter to drive. After driving back and forth in the immediate vicinity of the scene of the holdup, the robber finally ordered the collector to get out of the car, "act natural, and crawl across that fence into that field." The collector did as he was ordered, whereupon the robber with the money in the car drove off to the Maddox ranch in Duarte, a distance of about three miles, where he abandoned the Chevrolet car and where it was later found and removed by deputy sheriffs.

During the interval when the collector was driving in the vicinity of the scene of the crime, a mustache which the robber was wearing fell off, and, while he was picking it up and again fastening it on, the collector was able to get a close-up view of the robber's face. When the car was found, the mustache was in it but the money was missing. At the time of the trial, the collector identified the defendant as the man who held him up and at the point of a gun forced him to get out of the Chevrolet car and crawl across the fence into the field.

[1, 2] In defense appellant sought to prove an alibi to the effect that he was employed by the civil works administration and that at the time of the commission of the crime, i. e., about 12 o'clock noon of January 10, 1934, he was working in the Little Santa Anita Wash on the outskirts of Sierra Madre, at a point about half a mile from Foothill boulevard; that he went to work at noon and worked for five hours. Outside of his own testimony that he was working at noon of the day of the holdup, the only other evidence in corroboration is that of a fellow worker, who testified that defendant was working there after 12 o'clock; that he did not see him when he arrived, but that he saw him working on the job before 12:30; and the evidence of two timekeepers, who introduced their records to show that appellant worked five hours in the afternoon of the day of the holdup in the Little Santa Anita Wash. This latter evidence was somewhat uncertain, in that one of the timekeepers testified that he started checking in the men on the work before 12 o'clock and as a general rule he finished checking by a quarter after 12. However, the question of alibi was one for the jury to determine and it had before it evidence as to the distance from the scene of the crime to the job upon which appellant was working. The jury, after being properly instructed, found against the contention of the appellant and his witnesses, and having made its decision upon contradictory evidence, this court cannot interfere upon appeal.

[3] Appellant claims the evidence was insufficient to support the verdict and that the court erred in the reception and rejection of certain evidence.

It is shown by the record that appellant was identified by the collector as the man who committed the robbery. Also, according to the testimony of the witness Norton, appellant was seen driving a Chevrolet car at 12:30 of that noon hour, near the Maddox ranch at Duarte, three miles from the scene of the holdup, and where the collector's car was later found. Appellant's first point is based at most upon a conflict in the evidence. We are of the opinion that the evidence is ample to support the verdict and the judgment.

[4, 5] As his second point, appellant contends that the introduction in evidence of the $175 found in his garage constituted reversible error, because no proper foundation was laid for its introduction, and further that it was not shown to have had any connection with the crime that was committed. The fact that defendant had the sum of $175 concealed in a can in his garage was in itself a peculiar circumstance, especially in connection with the fact that he was working upon a project of the civil works administration. It is a fact of "political history," of which we may take judicial notice (Code Civ. Proc. § 1875, subd. 8), that that administration was established to provide work for indigent persons. Moreover, the defendant's statements to the police officers on two different occasions with reference to this $175 found in his garage, when taken in connection with all the surrounding circumstances, was a matter which we believe the jury was entitled to consider. There was evidence, which the jury was authorized to believe, which shows that these were false statements. The court did not err in overruling the objections of appellant to the reception in evidence of said money and the facts in relation thereto.

The judgment and order are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

3 Cal.App.2d 357

PEOPLE v. CLEVELAND.

Cr. 2641.

District Court of Appeal, Second District, Division 2, California.

Dec. 26, 1934.

Hearing Denied by Supreme Court Jan. 25, 1935.

Larceny 🔑65

Evidence that accused sold stolen automobile with serial number plate of automobile which accused purchased, and that plate bearing serial number of stolen automobile was found in accused's garage together with seat covers and cushions that were in automobile when it was stolen, *held* to support conviction of grand theft as against contention that evidence supported merely conviction of petty theft, or receiving stolen property.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Edward Cleveland was convicted of grand theft, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

STEPHENS, Presiding Justice.

Defendant was convicted by the court of grand theft. He has appealed from the judgment and order denying motion for new trial, although the record indicates that no such motion was made. It is claimed that the evidence is insufficient to support the determination of the guilt of appellant.

The 1931 Chevrolet of one Dietrich was stolen May 2, 1934, and was located and identified by him June 15 in a used car lot. Appellant was proprietor of a garage. He bought a car similar to Dietrich's which had a damaged body, and sold the stolen car to the used car dealer with the motor and body serial number plate which had been in the purchased car. The plate bearing the body serial number of the stolen car was found in appellant's garage, together with certain seat covers and cushions that were in the car when it was stolen.

It is suggested that the evidence would at the most support merely a conviction of petty theft or receiving stolen property. The evidence is sufficient to justify the conclusion that appellant was guilty of the offense of which he was convicted. People v. Smith, 117 Cal. App. 530, 4 P.(2d) 268; People v. Farrell, 67 Cal. App. 128, 227 P. 210.

Judgment and order affirmed.

I concur: CRAIL, J.

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3 Cal.App.2d 124

PEOPLE v. BARBER.

Cr. 1811.

District Court of Appeal, First District, Division 1, California.

Dec. 17, 1934.

1. Sodomy 🔑6

In prosecution for attempt to commit crime against nature, evidence that defendant placed his privates between boy's thighs for several minutes and made movements indicating attempt to accomplish crime, sustained conviction, although defendant and boy testified that no penetration occurred.

2. Sodomy 🔑6

Crime against nature may be proved by circumstantial evidence.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Dewey Barber was convicted of an attempt to commit the infamous crime against nature, and he appeals.

Affirmed.

Leo A. Sullivan and A. K. Whitton, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant was charged with an attempt to commit the infamous crime against nature, and has appealed from the judgment of conviction and an order denying his motion for a new trial. He claims that the evidence is insufficient to sustain the verdict.

[1, 2] The testimony shows without conflict that he placed his private parts between the thighs of a boy; that this continued several minutes and was accompanied by movements indicating an attempt to accomplish the crime. While the defendant and the boy testi-

fied that there was no penetration, the circumstances, not only tended to show the contrary, but were sufficient to justify the conclusion that defendant was attempting to commit the crime against nature. The offense might be proved by circumstantial evidence (State v. Vergenadis, 50 Nev. 1, 248 P. 900; State v. Smith, 137 Mo. 25, 38 S. W. 717; People v. Singh, 93 Cal. App. 32, 268 P. 958), and the jury was not, in view of the circumstances, bound to believe the testimony of either the defendant or the boy in the above respect.

There was ample evidence to support the verdict, and the order and judgment are accordingly affirmed.

* * *

3 Cal.App.2d 43

BALES v. METROPOLITAN CASUALTY INS. CO. OF NEW YORK.

Civ. 1174.

District Court of Appeal, Fourth District, California.
Dec. 12, 1934.

Appeal and error 🔑554(2), 627(2)

Where no bill of exceptions or transcript is filed, and statutory time for filing record has expired, appeal must be dismissed.

◆

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Margaret Bales, doing business under the fictitious name of the Alaska Fur Company, against the Metropolitan Casualty Insurance Company of New York. From the judgment, plaintiff appeals.

Appeal dismissed.

I. Henry Harris and I. Henry Harris, Jr., both of Los Angeles, and Lewis R. Kirby and William H. Wylie, both of San Diego, for appellant.

Mills, Hunter & Dunn, of Los Angeles, and Ray M. Harris, of San Diego, for respondent.

MARKS, Justice.

Respondent has moved to dismiss this appeal. No bill of exceptions or clerk's or reporter's transcripts have been filed in this court. It appears from the certificate of the clerk of the court below that judgment was rendered on January 17, 1934; that notice of entry of judgment was served on January 19, 1934; that notice of appeal was filed on February 1, 1934; that on July 30, 1934, the trial court terminated all proceedings for the preparation of a clerk's and a reporter's transcript and the settlement of a bill of exceptions.

The statutory time within which any record on appeal might be prepared and filed having expired, the appeal must be dismissed. Stewart v. Marple, 126 Cal. App. 771, 15 P. (2d) 202.

Appeal dismissed.

We concur: BARNARD, P. J.; JENNINGS, J.

* * *

2 Cal.App.2d 722

PRATT v. VAUGHAN et al.

Civ. 8839.

District Court of Appeal, Second District, Division 2, California.
Dec. 10, 1934.

Judgment 🔑720

Judgment for defendant, in suit for damages to property arising out of automobile accident wherein issues of negligence and contributory negligence were raised, *held* to estop plaintiff from further litigating same issues in subsequent suit for personal injuries arising out of same accident.

◆

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Suit by George B. Pratt against E. J. Vaughan and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

Elbert E. Hensley and John H. Klenke, both of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondents.

SCOTT, Justice pro tem.

Plaintiff appeals on the judgment roll from judgment for defendant. An accident oc-

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

curred involving the automobiles of the respective parties. This plaintiff sued defendant in the municipal court for damages to property arising out of the accident, claiming that defendant was negligent. The defense of contributory negligence was interposed. The municipal court found for defendant and judgment was entered. Plaintiff brought this suit in the superior court based on the same accident, seeking damages for personal injuries. Thereafter judgment became final in the municipal court action, and before trial of the instant case defendant was permitted to amend his answer herein, pleading the judgment in the earlier case as a defense and alleging that the "facts and matters alleged" in this case are res judicata by virtue of the former action. The superior court tried the case, found defendant was negligent, and plaintiff was not negligent, but also found as to each of said issues that it "was judicially passed upon, adjudicated and determined in the manner hereinafter set forth in these findings"; and further found that the same issue as to parties, accident, negligence, and contributory negligence was raised by the pleadings in the municipal court case above referred to, and was determined adversely to plaintiff, concluding that such adjudication "conclusively settled the rights of the parties thereto." Judgment was thereupon rendered for defendant.

Appellant contends that "the damage to property and injury to person, although resulting from the same wrong, are infringements of different rights and give rise to separate causes of action, and the recovery under one cause of action can not be pleaded in bar of a recovery on the other cause of action." This contention overlooks the true basis for the determination of the case by the trial court.

"There is a clear difference between the effect of a judgment as a bar to a subsequent action of an identical nature, and the effect of a decision upon issues in controversy when such decision is pleaded, not as a bar to a subsequent action of an identical nature, but only as an estoppel against further litigation of those issues." Detwiler v. Clune, 77 Cal. App. 562, at page 575, 247 P. 264, 269. "Treated from the standpoint of its use as a piece of evidence, it (a former judgment) may be produced when specifically pleaded as an estoppel * * * as evidence of some material fact in the cause of action on trial, the truth of which both parties are estopped from denying. * * * The judgment gives an indefinite life and irrebuttable probative force to any fact found by the judgment to be true." Estate of Clark, 190 Cal. 354, at page 361, 212 P. 622, 625. The judgment in the municipal court action operated as an estoppel to preclude this appellant from contending to the contrary of those matters of fact, to wit, the issues of negligence and contributory negligence, which were put in issue and solemnly found against him. Koehler v. Holt Mfg. Co., 146 Cal. 335, 80 P. 73.

The suggestion by appellant that in the first action the true party in interest as plaintiff was an insurance company and that, therefore, the capacity of plaintiff was not the same in the two cases, although it was the same party, does not find any support in the record presented to us.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

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3 Cal.App.2d 173

MacFARLAND v. SUPERIOR COURT IN AND FOR ORANGE COUNTY.

Civ. 1563.

District Court of Appeal, Fourth District, California.

Dec. 19, 1934.

1. Evidence 🔑82

On application for prohibition to restrain superior court from proceeding with action, it must be presumed that objection to superior court's jurisdiction, if valid, would be sustained by superior court, and thus obviate necessity for prohibition.

2. Courts 🔑207(5)

Court of Appeal has power to issue prohibition to restrain superior court from proceeding with action, although preliminary objection has not been made in superior court, but will hesitate to do so.

3. Prohibition 🔑5(3)

Prohibition *held* not to lie to restrain superior court from issuing peremptory writ of mandate commanding sheriff to levy writ of possession issued in unlawful detainer action brought against petitioner's assignor, where petitioner was assignee for benefit of creditors of judgment debtor and acquired no greater right in property than assignor had.

Application for writ of prohibition by Forrest S. MacFarland against the Superior Court in and for Orange County.

Alternative writ discharged, and petition for peremptory and absolute writ of prohibition denied.

Max Sisenwein, of Los Angeles, for petitioner.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondent.

JENNINGS, Justice.

An alternative writ of prohibition was granted by this court on the application of the petitioner herein, and it was ordered that the respondent show cause why it should not be absolutely restrained from any further proceedings in a certain action now pending before respondent. The respondent has duly filed its return to the alternative writ. The question which is now presented for determination is whether or not petitioner is entitled to the issuance of a peremptory writ absolutely and forever restraining respondent from taking any further action in the matter now pending before it.

The petition contains allegations of the following facts: On September 5, 1934, Louise Kelley, as plaintiff, instituted in the respondent court an action in unlawful detainer against Kelley's Drug, Limited, to recover possession of certain premises described as 108 West Fourth street, in the city of Santa Ana. A judgment was rendered in this action in favor of the plaintiff and against the defendant therein. On November 5, 1934, the sheriff of Orange county served a writ of possession, which had been issued in said action on November 2, 1934, by leaving a copy of said writ at the premises known as 108 West Fourth street in the city of Santa Ana. This writ of possession commanded the sheriff to place Louise Kelley, the plaintiff in said action, in the quiet and peaceable possession of the aforesaid premises. On November 6, 1934, petitioner caused to be served on the sheriff a notice advising the sheriff that petitioner "as assignee for the benefit of creditors of Kelley's Drug, Ltd.," was then in possession, and had been in continuous possession of the premises since June 19, 1934. Petitioner went into possession of the property on June 19, 1934, and thereafter paid rent to the First National Bank of Santa Ana, owner of said premises, for the remainder of the month of June, 1934, and for the months of July and August, and tendered to said bank the rent due for the month of September, but the bank refused to accept such tender. Petitioner, after he took possession of the premises, had no dealings with Louise Kelley with respect to his occupancy thereof. Petitioner has never been served with any notice to vacate the premises by the First National Bank. No privity of contract or estate between petitioner and Louise Kelley exists or has existed since petitioner has been in possession of the premises. Petitioner was not a party defendant in the action brought by Louise Kelley against Kelley's Drug, Limited, and made no appearance therein. The sheriff of Orange county has not executed the writ of possession issued in the above-mentioned action. On November 10, 1934, in an action instituted by Louise Kelley against the sheriff of Orange county, the respondent court issued an alternative writ of mandate directed to said sheriff commanding him to make immediate levy of the writ of possession or to show cause on a specified date why he should not levy said writ. Unless restrained by order of this court, the respondent threatens and intends to hear, pass upon, try, and decide the proceedings in the action instituted by Louise Kelley against the sheriff. The respondent court has no jurisdiction to proceed with the hearing of said action, for the reason that petitioner is not a party thereto and was not a party to the former action instituted by Louise Kelley against Kelley's Drug, Limited, and has made no appearance in either of said actions. The respondent court is attempting to adjudicate property rights of petitioner and to deprive petitioner of his enjoyment of the premises hereinabove described without due process of law. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law. The remedy of appeal in particular will afford to petitioner no speedy or adequate remedy, for the reason that he is not a party to either of the aforesaid actions. The application for a writ of prohibition is made to this court in the first instance because the respondent court has heretofore issued the alternative writ of mandate directed to the sheriff of Orange county; therefore petitioner cannot apply to respondent to restrain itself from proceeding with the hearing of the action in which the said writ of mandate was issued.

From the above-described allegations of the petition it is apparent that petitioner desires this court to restrain respondent from issuing a peremptory writ of mandate commanding the sheriff of Orange county to levy the writ of possession issued by respondent in the prior action of Louise Kelley against Kelley's Drug, Limited. Petitioner alleges that he will thus be deprived of his possession of the premises without due process of law, and maintains that respondent is without jurisdiction to proceed in said matter, for the reason that petitioner is not a party to, and has not appeared in, said proceeding nor in the former action instituted by Louise Kelley against Kelley's Drug, Limited.

[1, 2] The inquiry which immediately suggests itself is why petitioner should not in some appropriate manner bring to respondent's attention in the proceeding for a writ of mandate the objection to respondent's lack of jurisdiction which he here so zealously maintains. If, as he contends, respondent is wholly lacking in jurisdiction to proceed, why should he not apply for permission to intervene in that proceeding and present his complaint directly to respondent? It may not be presumed that permission to intervene will be denied. Certainly it is not to be presumed that a valid objection to respondent's lack of jurisdiction will be erroneously overruled. On the contrary, it must be presumed that the objection, if valid, will be sustained, and thus the necessity for the issuance of a writ of prohibition will be obviated. Havemeyer v. Superior Court, 84 Cal. 327, 403, 24 P. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192. It may be conceded that this court is not without power to issue the writ which is here sought, although preliminary objection has not been made in the lower court, but as a matter of practice it should hesitate to do so because of the consideration due to respondent, plus the laudable desire to prevent unnecessary litigation. McCarte v. Superior Court, 94 Cal. App. 507, 510, 271 P. 512.

[3] However, if the application be considered without reference to the failure of petitioner to have presented to the respondent court his objection to its lack of jurisdiction, the writ must be denied. In the final analysis, it is apparent that petitioner's claim of an interest in the premises which he asserts will be taken from him without due process of law is based upon the fact that he is the assignee of Kelley's Drug, Limited, for the benefit of creditors. As such assignee he acquired no greater right in the property than his assignor had at the time of assignment, and can assert no claim to property which the assignor might not assert. First Nat. Bank v. Menke, 128 Cal. 103, 60 P. 675; Moore v. Schneider, 196 Cal. 380, 238 P. 81. The adjudication of the respondent court in the unlawful detainer action brought by Louise Kelley against petitioner's assignor that the plaintiff therein was entitled to recover possession of the premises was determinative of any claim to possession that petitioner might assert as assignee for the benefit of creditors of the defendant in said action. So far as appears, the assignment was entirely voluntary, and petitioner may not successfully contend that he has any different or higher right in the property than his assignor had.

The alternative writ heretofore granted is therefore discharged, and the prayer of the petition for a peremptory and absolute writ of prohibition is denied.

We concur: BARNARD, P. J.; MARKS, J.

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2 Cal.App.2d 590

WHITMORE v. CARR et al.

Civ. 9412.

District Court of Appeal, First District,
Division 1, California.
Dec. 5, 1934.

1. Statutes 🔑35½

Power of "referendum" is the right reserved to the people to adopt or reject any act or measure which has been passed by a legislative body, and which, in most cases, would without action on the part of the electors become a law.

[Ed. Note.—For other definitions of "Referendum," see Words & Phrases.]

2. Municipal corporations 🔑108

Under section of charter of city of Oakland defining effect of vote cast on any ordinance or measure referred to electors, words "ordinance" and "measure" are synonymous, each meaning a legislative enactment (St. 1911, p. 1646, § 185).

[Ed. Note.—For other definitions of "Measure" and "Ordinance," see Words & Phrases.]

3. Municipal corporations 🔑108

Ordinance forbidding firemen to remain on duty for more than fourteen consecutive hours, introduced but not passed nor adopted by council of city of Oakland which referred ordinance to voters who approved it, *held* invalid, since ordinance never attained status of legislative enactment which could be referred to voters (St. 1911, p. 1644, § 179; p. 1646, § 185; Const. art. 4, § 1, as amended in 1911).

4. Appeal and error ⚷151(2)

Fireman receiving every fourth day off with pay *held* not aggrieved by order denying peremptory writ of mandate to compel city manager and fire chief to allow him every fifth day off with pay as required by charter of city of Oakland, and hence he could not appeal therefrom (St. 1919, p. 1369, § 100; Code Civ. Proc. § 938).

◆

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Petition for a writ of mandate by William T. Whitmore against Ossian E. Carr, as city manager of the city of Oakland, and William G. Lutkey, as chief of the fire department of the city of Oakland. From an order denying a peremptory writ of mandate, petitioner appeals.

Affirmed.

George Gelder, of Oakland, for petitioner.

F. B. Fernhoff, City Atty., and Homer W. Buckley, Asst. City Atty., both of Oakland, for respondents.

JONES, Justice pro tem.

This is an appeal from an order denying a peremptory writ of mandate after a return to an alternative writ of mandate and a hearing upon an order to show cause.

The petitioner is an active member of the fire department of the city of Oakland. His petition filed in the superior court of Alameda county alleges that he has not been allowed a leave of absence, with full pay, of not less than twenty-four hours' duration every fifth day, in violation of section 100 of article 15 of the charter of the city of Oakland (St. 1911, p. 1612, as amended by St. 1919, p. 1369), and that in violation of ordinance No. 1609, N. S., of the city of Oakland, he has been compelled by the city manager and the chief of the fire department of the city of Oakland to remain on duty for more than fourteen consecutive hours at times other than when changing from one tour of duty to another, or in cases of conflagration requiring the service of more than one-half of the fire department. The prayer of the petition is for a writ of mandate to compel the city manager and the chief of the fire department to accord the privileges which he alleges have been denied him.

Upon the filing of the petition an alternative writ of mandate was issued directing the city manager and the chief of the fire department to accede to the demands of petitioner as alleged, or to show cause on a return date why they had not done so. The officers named made return to the writ, answered the petition, and the entire matter was brought on for hearing. Findings of fact and conclusions of law were waived by stipulation of the parties.

The respondents contend that said ordinance No. 1609, N. S., is invalid and of no effect.

The parties have stipulated as facts that ordinance No. 1609, N. S., was introduced in the city council of the city of Oakland as a bill at a regular meeting of said council on the 10th day of April, 1919, and that said bill was read in open council twice only, and was never signed, passed, or adopted by the said city council; that in this state it was submitted to the voters of the city at a regular municipal election held on the 6th day of May, 1919, and, at said election, a majority of the votes cast upon the proposition were in favor of its adoption.

[1] Article 22 of the charter of the city of Oakland, embodying sections 177 to 186, inclusive (St. 1911, p. 1643 et seq.), deals with the right of the electors of the city to exercise the power of referendum over local measures. This power of referendum is the right reserved to the people to adopt or reject any act or measure which has been passed by a legislative body, and which, in most cases, would without action on the part of the electors become a law. This power of referendum, as well as that of the initiative, is reserved by section 1 of article 4 of the Constitution to the people of each city and town in the state, with the right in cities acting under a charter to provide for the manner in which the power may be exercised.

The procedure for exercising the power of referendum, in so far as this case is concerned, is prescribed by section 179 of article 22 of the charter, as it stood in 1919 (St. 1911, p. 1644), which is as follows:

"Any ordinance which the council is empowered to pass may be submitted by an affirmative vote of three (3) of its members at a general municipal election only, subject to the provisions of this article so far as applicable."

By this provision there is vested in three members of the council, concurring, the right to invoke the power of referendum upon any ordinance passed by the council, and which, without the referendum being invoked, would become effective as an ordinance.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

The effect of a vote taken upon the submission of an ordinance to the electors in the manner as provided in section 179 of the charter, or by any other provision of article 22 of the charter, is defined by section 185 (St. 1911, p. 1646), which reads:

[2] "If a majority of the votes cast on any ordinance or measure so referred to the electors, as herein provided, shall be in favor thereof, it shall go into effect five (5) days after the declaration of the official canvass; otherwise it shall be repealed and rejected."

The words "ordinance" and "measure" are synonymous, each meaning a legislative enactment. In substance, section 185 of the charter provides that when any legislative enactment adopted by the city council is referred to the electorate under any of the provisions of article 22, its operation as such is suspended until five days after the declaration of the result of the election, when, if the result is favorable, it shall go into effect, otherwise it shall be repealed and rejected.

Enactment is not a quality of the referendum. It comes from the exercise of the power of the initiative by the electorate, which, in the case of the city of Oakland is provided for in article 21 of the charter (St. 1911, p. 1639, §§ 162–176) or from action by a legislative assembly. The referendum is limited in its operation to the adoption or rejection of legislation already enacted by a legislative body, and in the absence of such prior enactment there can be neither "repeal and rejection," to use the terms of the charter provision, nor adoption by the electorate.

[3] Ordinance No. 1609, N. S., was never passed or adopted by the city council, and it never attained the status of a legislative enactment. For the electors to adopt it, upon it being referred to them, could give it no added legislative effect, and to vote against it would repeal nothing, for it was without legislative effect in itself. It never became an enactment by the council or the people, and, as an ordinance of the city of Oakland, it stands invalid and ineffectual for any purpose.

[4] The one other point made by the petitioner is that the respondents have failed to comply with the provisions of section 100 of article 15 of the charter (as amended by St. 1919, p. 1369). This section is as follows:

"Each member of the Fire Department shall be allowed a leave of absence, with full pay, of not less than twenty-four hours duration every fifth day."

The return to the writ shows that, after it was served upon the respondents, an order was issued by the chief of the fire department putting into effect a schedule of duty for the members of the fire department under which the shifts, or tours of duty, are so arranged that each member goes off night duty at 8 a. m. of every fourth day for a twenty-four-hour period, with no deduction in pay for such time off.

Petitioner is receiving every fourth day off with pay instead of every fifth day off with pay, as prescribed by the charter, and is in nowise aggrieved by the judgment entered in the lower court, and hence in no position to prosecute this appeal. Custis v. Gehele, 177 Cal. 455, 170 P. 1109; Code Civ. Proc. § 938.

The order appealed from is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

GORE v. MARKET STREET RY. CO. et al.*

Civ. 8816.

District Court of Appeal, First District,
Division 1, California.

Dec. 18, 1934.

Hearing Granted by Supreme Court
Jan. 28, 1935.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Amending prior opinion, 37 P.(2d) 1059.

William M. Abbott, Walter H. Linforth, and William M. Cannon, all of San Francisco, for appellants.

Ford & Johnson and Fletcher A. Cutler, all of San Francisco, for respondent.

PER CURIAM.

It is ordered that the opinion filed in the above-entitled action be amended by striking from the first paragraph thereof the words "judgment entered thereon" and inserting in lieu thereof the following: "Order denying the motion of defendants for judgment notwithstanding the verdict"; and also by striking from the last paragraph of the opinion the word "judgment," and inserting in lieu thereof the word "order."

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*For subsequent opinion see 48 P.2d 2.

2 Cal.App.2d 698

PEOPLE v. DUKES et al.

Cr. 2565.

District Court of Appeal, Second District,
Division 2, California.

Dec. 8, 1934.

Hearing Denied by Supreme Court
Jan. 7, 1935.

1. Criminal law 🔑**200(6)**

Acquittal on robbery charge was no bar to prosecution for conspiracy to commit such robbery, where other overt acts than actual commission of robbery were set out; crime of conspiracy being distinct offense from actual commission of crime forming object of conspiracy.

2. Criminal law 🔑**429(2)**

Where defendants who had been acquitted on robbery charge, in support of pleas of former jeopardy in prosecution for conspiracy to commit robbery, offered in evidence transcript of evidence taken in robbery prosecution, exclusion of portion relating to matters occurring before day of robbery *held* not error.

3. Criminal law 🔑**511(4)**

In prosecution for conspiracy to commit robbery, accomplices *held* sufficiently corroborated, where one witness positively identified defendants as perpetrators of robbery and one defendant admitted essential elements of conspiracy (Pen. Code, § 1111).

4. Criminal law 🔑**511(1)**

Entire conduct of defendant may be looked to for corroborating circumstances, where accomplice testimony is offered, and, if from such circumstances connection of accused with crime may fairly be inferred, corroboration is sufficient (Pen. Code, § 1111).

5. Criminal law 🔑**748, 886**

In prosecution for conspiracy to commit robbery, instruction that jury fix degree of crime in event of conviction was error, and inclusion in verdict of jury's conclusion as to degree was surplusage, though not prejudicial.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Perry Dukes and another were convicted of conspiracy to commit robbery, and they appeal.

Affirmed.

Keith R. Jensen and Jesse R. Shafer, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Defendants were charged with conspiracy to commit robbery, the information setting out nine overt acts prior to the robbery and, as a tenth overt act, the robbery itself. Ledbetter was also charged with a prior felony, robbery, conviction of which he admitted. In a previous case defendants had been charged with committing the identical robbery which is alleged as the tenth overt act in the instant case, and had been tried and acquitted on that charge. They entered pleas in this case of not guilty, former acquittal, and once in jeopardy. The jury found against each defendant on the two latter pleas and convicted each of the crime of conspiracy to commit robbery. By their verdicts they fixed the degree of such crime as first degree as to Ledbetter and second degree as to Dukes. Defendants appeal from the judgment and order denying their motion for new trial.

[1] It is contended that acquittal on the robbery charge in the earlier case precluded conviction on the conspiracy charge in this case. The first nine overt acts set out in the information before us are acts other than the act of robbery charged in the first case. Acquittal in that case would preclude further prosecution on the conspiracy charge only if the act of robbery was the sole overt act set out in the later information. Oliver v. Superior Court, 92 Cal. App. 94, 267 P. 764. "The crime of conspiracy is a distinct offense from the actual commission of the crime forming the object of the conspiracy" (People v. Martin, 114 Cal. App. 392, 300 P. 130, 132), and the acquittal on the former charge is no bar to a successful prosecution in this case.

[2] In support of their pleas of former jeopardy and acquittal, defendants offered in evidence a transcript of evidence taken at the trial of the earlier case. The trial court excluded the portion relating to matters occurring before the day of the robbery. While the testimony thus excluded did fortify the people's case on the robbery trial, it was no proper matter to place before the jury in the instant case, since it was not needed to identify defendants, the offense, or the disposition of the earlier case.

[3, 4] The accomplices who testified were sufficiently corroborated by other evidence as required by Pen. Code, § 1111. The witness Stephenson positively identified defendants as being perpetrators of the robbery, and de-

fendant Dukes made a statement admitting the essential elements of the conspiracy charged. "The entire conduct of the defendant may be looked to for the corroborating circumstances, and, if from those circumstances the connection of the accused with the crime may fairly be inferred, the corroboration is sufficient." People v. Shurtleff, 113 Cal. App. 739, at page 743, 299 P. 92, 94.

[5] The court instructed the jury to fix the degree in the event of a verdict against defendants. This was error. People v. Clement, 97 Cal. App. 238, 275 P. 511. The inclusion in the verdicts of the jury's conclusion as to the degree was surplusage, and did not prejudicially affect either defendant.

Judgment and order affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

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3 Cal.App.2d 98

Ex parte SALAS.

Cr. 304.

District Court of Appeal, Fourth District, California.

Dec. 14, 1934.

Rehearing Denied Dec. 27, 1934.

1. Habeas corpus 🔑92(1)

On petition for habeas corpus to secure release from custody, court was concerned only with what appeared on face of commitment, not only because evidence on which conviction was based was not before it, but because insufficiency of such evidence could not be raised in habeas corpus proceeding under circumstances.

2. Criminal law 🔑984

Prisoner *held* not entitled to release on habeas corpus on theory that he was serving consecutive maximum sentences for two violations of same section of Code respecting vagrancy, where commitment as changed by modifying judgment did not show sentences were for violation of same section, but recited convictions under two sections (Pen. Code, §§ 647, 650½).

3. Habeas corpus 🔑85(1)

In habeas corpus proceeding, all presumptions favor regularity of order under which petitioner is held in custody, and, if necessary, court will presume that counts on which judgment was affirmed charged respectively violation of two sections of Code, especially where affirming order stated petitioner was convicted of violating both sections and affirmed judgment as to two counts (Pen. Code §§ 647, 650½).

4. Criminal law 🔑999(1)

Commitment for vagrancy stating that defendant was charged with and adjudged guilty of "a misdemeanor" *held* not void for indefiniteness where charge was made more definite by following words and plain meaning of language used was that defendant was found guilty of violation of each of sections named relating to vagrancy, notwithstanding use of singular instead of plural in preceding general descriptive phrase used (Pen. Code, §§ 647, 650½).

5. Criminal law 🔑999(1)

In habeas corpus proceeding to secure release from custody, any technical defect in commitment *held* cured by order affirming judgment as to two counts, and by further order directing sheriff to imprison petitioner "in accordance with the terms of modified judgment."

6. Habeas corpus 🔑55

Purported copy of remarks made by judge of superior court when appeal from justice's court was under consideration, though included in petition for habeas corpus by one imprisoned in such case, *held* not part of record to be considered.

◆

Application of Frank Salas for a writ of habeas corpus.

Writ discharged and petitioner remanded.

Harry Pransky and James M. Carter, both of Los Angeles, for petitioner.

Earl Redwine, Dist. Atty., of Riverside, for respondent.

BARNARD, Presiding Justice.

In this petition for a writ of habeas corpus it is alleged that Frank Salas was charged in a criminal proceeding in the justice's court of the city of Riverside with the crime of vagrancy; that "one count" of the complaint charged him with a violation of subdivision 1 of section 647 of the Penal Code; that "a second count" charged him with a violation of subdivision 5 of that section; that both violations were alleged to have been committed on one and the same day; that he was tried by a jury and found guilty of "the offenses charged in the two counts of vagrancy referred to"; that he was sentenced to the term of six months in jail on each of said counts of vagrancy with the further order that said sentences should run consecutively, making the total sentences for the said offenses a period of twelve months' imprisonment; that he appealed to the superior court of Riverside county on various grounds including the insufficiency of the evidence; that the judgment and sentence were there affirmed; that he has served more than six months of said imprisonment; and that he is still confined in the county jail. It is further alleged that the said Frank Salas is unlawfully and illegally detained and confined for the reasons that subdivisions 1 and 5 of section 647 of the Penal Code are unconstitutional and that the justice's court in question exceeded its jurisdiction in that two separate sentences of six months each were imposed for the conviction of one and the same crime, to wit, vagrancy.

In his return, the respondent sheriff sets forth that he is holding the said Frank Salas by virtue of a commitment issued out of said justice's court and a modified judgment issued by the superior court of Riverside county, copies of both of said instruments being attached to the return. The commitment sets forth that a complaint had been filed charging the said Frank Salas with "certain public offenses, to-wit: a misdemeanor, to-wit: violation of sections 647 and 650½" of the Penal Code, committed on January 13, 1934, that a warrant had been issued, that he had been arrested and tried by a jury and found guilty as charged in the complaint, and orders and adjudges that the said Frank Salas is guilty of the crime of misdemeanor, to wit, violation of sections 647 and 650½ of the Penal Code, and that he be imprisoned in the county jail for the term of six months on each of four named counts, the sentence as to counts 1, 2, and 3 to run consecutively, and as to count 4 to run concurrently therewith. The modified judgment, entered on appeal in the superior court, recites that the said Frank Salas had been duly convicted of the crime of a misdemeanor, to wit, violation of sections 647 and 650½ of the Penal Code on four separate counts; that he was sentenced to six months in the county jail on each count, the sentence on the first three to run consecutively and the fourth to run concurrently with the others; and that the matter had been presented upon appeal. It then orders the judgment affirmed with respect to the matters charged in counts 1 and 2 of the complaint, and reversed in so far as counts 3 and 4 are concerned.

The main point attempted to be raised here is that a person guilty of doing two or more of the acts denounced by the various subdivisions of section 647 of the Penal Code on the same day, has committed but one offense of vagrancy and that the punishment therefor may not exceed the maximum term of six months in jail. However interesting this point may be, we think it is not presented by the record here which discloses a conviction under two distinct sections of the Code, and not under two subdivisions of the one section.

[1] It may first be observed that we are here concerned only with what appears on the face of the commitments, not only because the evidence upon which the conviction is based is not before us, but because the matter of the insufficiency of the evidence may not be raised in this proceeding under the circumstances here appearing. In re Cutler (Cal. App.) 36 P. (2d) 441. The petitioner concedes this, but contends that the commitment under which he is held and the order modifying the judgment are void on their face in so far as they purport to provide for a sentence in excess of six months, the maximum sentence provided by section 647 of the Penal Code. In support of this contention it is argued that it clearly appears from the commitment that the petitioner was found guilty of a violation of section 647 only; that he was not found guilty of a violation of any other section; and that he was found guilty of one misdemeanor and no more. It is then argued that vagrancy constitutes but one crime even though a defendant has committed more than one of the acts thus defined, and that a double punishment here appears.

[2] The petition herein omits all reference to section 650½ of the Penal Code, upon which the commitment and the modifying judgment are in part based. This section is also ignored in the argument made in petitioner's briefs, the only reference thereto being the following: "We have treated this commitment as though it omitted the statement concerning section 650½ of the Penal Code." We think the commitment and the order modifying the judgment may not be thus treated. The commitment recites that a complaint had been filed charging the commission of "certain public offenses," enumerated as a violation of both sections 647 and 650½ of the Penal Code, and that the defendant was found guilty as charged in the complaint. It further sets forth that the court adjudged that the defendant was guilty of a violation of both

of these sections and that he be imprisoned in the county jail for the term of six months on each of four counts which are designated by number. The two sections of the Code cover different offenses, and it is perfectly apparent that the violation of both would constitute two offenses and not one and the same offense. The maximum punishment provided for a violation of each of these sections is six months.

[3] It conclusively appears that the petitioner is in error in his contention that the commitment itself discloses that he was found guilty of a violation of section 647 only, and that he was not found guilty of violating any other section. Furthermore, it in no way appears from the commitment, as changed by the modifying judgment of the superior court, that the separate sentences finally imposed were for the violation of two of the subdivisions of section 647. The order modifying the judgment affirmed the same as to two counts, and reversed it as to two others. What was charged in the respective counts nowhere appears, but all presumptions are in favor of the regularity of the order of the superior court and, if necessary, we must presume that counts 1 and 2, in which the judgment was affirmed, charged respectively a violation of section 647 and section 650½ of the Penal Code, especially since the affirming order sets forth specifically that the petitioner was convicted of a violation of both of these sections, and affirms the judgment as to two counts.

[4, 5] While the commitment states that the defendant was charged with and is adjudged guilty of "a misdemeanor," this is made more definite by the words which follow that statement and the plain meaning of the language used, taken in connection with its context, is that he was found guilty of a violation of each of the sections named, and, we think, the same is not rendered void by the use of the singular instead of the plural in the preceding general descriptive phrase used. It further appears that any technical defect in the commitment was cured by the order affirming the judgment in so far as the first two counts are concerned, and by the further order directing the sheriff to keep and imprison the petitioner in the county jail "in accordance with the terms of said modified judgment." The order modifying the judgment, after reciting that the defendant had been convicted and sentenced to six months' imprisonment on each of counts 1, 2, 3, and 4, ordered the judgment affirmed "under counts No. 1 and 2 of the complaint."

[6] The petition contains a purported copy of certain remarks made by the judge of the superior court when the appeal from the justice's court was under consideration. Not only is this not a part of the record but, if considered, the same contains nothing which could affect the situation in any way.

A further point raised is that subdivisions 1 and 5 of section 647 of the Penal Code are unconstitutional. There is nothing in the record before us to show that either of the offenses of which the petitioner was convicted was in any way connected with either of these subdivisions of said section.

For the reasons given, the writ is discharged and the petitioner is remanded.

We concur: MARKS, J.; JENNINGS, J.

3 Cal.App.2d 752

In the Matter of the Application of Earl AMBROSE, for a Writ of Habeas Corpus.

Cr. 305.

District Court of Appeal, Fourth District, California.

Dec. 14, 1934.

Rehearing Denied Dec. 27, 1934.

Application for writ of habeas corpus. Riverside County.

Harry Pransky and James M. Carter, both of Los Angeles, for petitioner.

Earl Redwine, Dist. Atty., of Riverside, for respondent.

BARNARD, Presiding Justice.

This is an application for a writ of habeas corpus. With the exception of the name of the petitioner, the essential facts herein are identical with those appearing in the case of In re Salas (Cal. App.) 38 P.(2d) 806, this day decided. For the reasons therein given, a similar order should be entered herein.

The writ is discharged and the petitioner remanded.

We concur: MARKS, J.; JENNINGS, J.

PACIFIC EMPLOYERS' INS. CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.*

Civ. 9787.

District Court of Appeal, Second District, Division 2, California.

Dec. 6, 1934.

Hearing Granted by Supreme Court Feb. 4, 1935.

Master and servant 🔑**361**

Transaction whereby newspaper company delivered papers, to be sold and paid for at certain price or returned, to newsboy employee, who assumed risk of loss, was "sale or return," passing title to newsboy on delivery subject to being revested in seller, and hence newsboy was excluded from operation of Compensation Act as employee engaged in selling newspapers directly to public where title has passed to him (St. 1931, p. 2068, § 8 (a); Civ. Code, § 1739, rule 3 (1), as added by St. 1931, p. 2240).

[Ed. Note.—For other definitions of "Sale or Return," see Words & Phrases.]

◆

Proceeding under the Workmen's Compensation Act by Ross E. Davenport, a minor, employee, by Mrs. Laura Davenport, his guardian ad litem, opposed by the Los Angeles Times and another, employers, and the Pacific Employers' Insurance Company, insurance carrier. To review an award of the Industrial Accident Commission in favor of the claimant, the insurance carrier petitions for a writ of review.

Award annulled.

F. Britton McConnell, of Los Angeles, for petitioners.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondent Industrial Accident Commission.

WILLIS, Justice pro tem.

Petitioner Pacific Employers' Insurance Company, insurance carrier for Los Angeles Times at the time of the accident and injuries described herein, seeks to annul the award of the Industrial Accident Commission in favor of Ross E. Davenport under the Workmen's Compensation Act, and against the insurance carrier; said award having released and discharged the Los Angeles Times and its district manager, respondent Eugene Frederick Lewis.

There is no controversy herein in respect to the accident, injuries, or amount of the award. It is conceded by all parties that Davenport was an employee of Los Angeles Times and that at the time of injury was engaged in selling or offering for sale, directly to the public, newspapers delivered to him by the Times. To the same effect the commission found, and we are in entire accord, after examining the evidence, with the concession and such finding. The sole question left in controversy is: Had title to such newspapers delivered to the employee Davenport passed to him at the time he was so engaged in selling them?

The evidence without conflict shows that Davenport was employed to sell the Sunday editions of Los Angeles Times from 4 p. m. to midnight on Saturdays; that he was selected by the district manager of the Times, working in conjunction with its circulation manager, and his station and hours of work were designated by them; that to him were delivered the several editions of the Sunday Times, which he was either to return or pay for at 7½ cents each, he to assume the risk of loss or theft thereof. In addition to the profit derived by him on resale of the papers, the Los Angeles Times paid him 50 cents for each Saturday, for which he gave his receipt as "pay." It is clear from the evidence that Los Angeles Times, as seller, delivered to its employee Davenport, as buyer, newspapers to be sold to the public or returned to the seller.

In 1931 section 8 (a) of the Workmen's Compensation Act was amended (St. 1917, p. 835, § 8 (a), as amended by St. 1931, p. 2068) by adding to the list of employees excluded from the operation of the act "any person engaged in vending, selling, offering for sale, or delivering directly to the public, any newspaper, magazine or periodical where the title to such newspaper, magazine or periodical has passed to the person so engaged." The word "person" used in the above clause clearly refers to "employees," as the act in question does not purport to operate on any person except employees of an employer. At the same session of the Legislature there was passed the Uniform Sales Act (St. 1931, p. 2234), comprising title 1 of part 4, sections 1721 to 1800, inclusive, of the Civil Code. By section 1739 thereof (St. 1931, p. 2240) it is provided that unless a different intention appears, certain rules are to be followed for ascertaining the intention of the parties as to the time at which the property or title in the goods is to pass to the buyer. Among these rules is the following: "Rule 3. (1) When goods are delivered to the buyer 'on sale or return,' or on other terms indicating

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 47 P.2d 270.

an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time."

On this subject of "sale or return" in the Uniform Sales Act, the author of Mechem on Sales (section 677) says: "A contract of this nature * * * constitutes usually a present sale subject to be defeated by a condition subsequent. Until return, therefore, the title is in the vendee. He may sell the goods as his own and thus defeat the return; or they may be seized by his creditors, with the like effect. The risk usually is his also, as the risk follows the title." In Williston on Sales (section 270), in discussing the distinction between sales "on approval" and "on trial" or "on satisfaction," and "sale or return," the author says: "The English Sale of Goods Act does not distinguish between these two kinds of bargains, though the draughtsman of the act suggests the possibility of the transaction being carried out in either way. * * * The English cases lean very strongly towards the view that the property does not pass until the buyer is bound. On principle, however, there seems no reason to suppose the parties should adopt one form of transaction rather than the other; both are common. Such is the doctrine of the American cases. The question is one of fact in every case whether the parties intend to make approval a condition without which the property shall not pass, or whether their intent is that the property shall pass at once with the right of return of the goods. * * * The use of the word 'return' itself ordinarily implies a previous transfer of the property."

Under the evidence herein there appears no expression of intention of the parties in their agreement or arrangements as to the time at which the title in the papers was to pass to the newsboy. Under section 1739 of the Civil Code we must therefore be guided by rule 3 in determining such intention. The papers herein involved were delivered to the newsboy "on sale or return," and therefore, under the rule quoted, the property or title passed to the latter on delivery to him, subject to being revested in the seller by returning the same or any number thereof to its district manager when he called for settlement of the account. The transaction constituted a present sale, subject to being defeated by a condition subsequent. The fact of assumption of all loss or risk by the newsboy supports this conclusion, as the risk follows the title; and this fact furnishes additional proof of intention to vest title on delivery.

From the foregoing it follows that the newsboy Davenport was an employee who was excluded from the operation of the Workmen's Compensation Act by the terms of section 8 (a) as amended in 1931.

The award is annulled.

We concur: STEPHENS, P. J.; CRAIL, J.

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2 Cal.App.2d 690

In re L'ITALO-AMERICANO.

BARONI v. ARDERY.

Civ. 8290.

District Court of Appeal, Second District,
Division 1, California.
Dec. 8, 1934.

Newspapers 🔑3(5)

Newspaper published in Italian language *held* not of "general circulation" within statutes relating to publications, where such foreign newspaper contained but single page printed in English of miscellaneous matter not devoted to dissemination of local or telegraphic news and intelligence of general character (Pol. Code, §§ 4458–4465; Const. art. 4, § 24).

[Ed. Note.—For other definitions of "General Circulation," see Words & Phrases.]

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Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Proceeding to have L'Italo-Americano declared a newspaper of general circulation brought by Cleto Baroni, petitioner, opposed by Roy E. Ardery. From a decree in favor of petitioner, contestant appeals.

Reversed.

Stanley F. Maurseth, Hill, Morgan & Bledsoe, and Kenneth K. Wright, all of Los Angeles, for appellant.

Ernest M. Torchia, of Los Angeles, for respondent.

Carroll H. Smith, of San Diego, amicus curiæ.

HOUSER, Justice.

Under the statutory provisions of sections 4458 to 4465, inclusive, of the Political Code, which relate to what may be termed substantive law, as well as procedure, in connection with publications in newspapers required to be given or made respectively by state, county, city, or other officers, a newspaper known as L'Italo-Americano petitioned the superior court for its order by which, if granted, said newspaper would be adjudged a newspaper of general circulation, as defined in section 4460 of the Political Code. To such petition a contest was filed by appellant herein. From a decree by the trial court in favor of the petitioner, an appeal has been taken to this court.

By section 4460 of the Political Code a newspaper of general circulation is thus defined: "A newspaper of general circulation is a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, having a bona fide subscription-list of paying subscribers, and which shall have been established, printed and published at regular intervals, in the state, county, city, city and county, or town, where such publication, notice by publication, or official advertising is given or made, for at least one year preceding the date of such publication, notice or advertisement. A newspaper devoted to the interests, or published for the entertainment or instruction of a particular class, profession, trade, calling, race, or denomination, or for any number of such classes, professions, trades, callings, races or denominations when the avowed purpose is to entertain or instruct such classes, is not a newspaper of general circulation."

For present purposes only, without being so conceded or decided, it may be assumed that, as far as concerns the Italian subscribers to the newspaper, generally speaking the newspaper met the statutory requirements, and that, excepting for the fact that it was published almost entirely in the Italian language, it was entitled to the order or judgment made by the superior court. In that regard, it is admitted that all but a single page of the newspaper was printed in the Italian language, and that ordinarily, as set forth in appellant's brief herein, such single page "contains more or less stereotyped matter, including lessons in Italian, publicity matters from the moving picture studios and some articles on history, together with school notes. The school notes relate more or less to matters affecting the Italian people. There is no attempt to publish general news in this English section, and it was not the purpose of the publishers, in printing the English section, to advise the English-speaking people of the news of the day. Sometimes editorials are carried in the English section, but in general the matters appearing in the English section are matters referring to the schools or concerning people of the moving picture colony."

On the hearing of the petition, the editor of the newspaper testified: "We do not have as our purpose in printing the English section, telling the English-speaking people the news of the day. Practically all of the news of the day that we publish is published in Italian. I know of some of our subscribers who do not speak or write Italian. I could hardly say as to how many. I know personally of four or five who do not speak Italian but who subscribe to the newspaper. These are not advertisers in the newspaper. All of our advertisements are in Italian. It was our purpose when we established this newspaper to have a vehicle for disseminating news among the Italian people, and we do not as the main purpose expect to have it as a medium for the disseminating of general news to the English-speaking or Spanish-speaking or German-speaking people. In general we try to get the general news of all the world, but we give a little more emphasis upon matters concerning Italy than the rest of the news. We thought that the people who would subscribe to our newspaper would be more interested in the matters affecting the Italian people. It was not only our purpose in printing the page in English to educate the Italian people in the English language, but also to have a page dedicated to some of the Italians and Americans that we have as subscribers. We have over 1000 subscribers."

The limited question, then, that is submitted for determination by this court is whether a newspaper published in a foreign language can be said to be of "general circulation" within the meaning and intent of section 4460 of the Political Code, section 24 of article 4 of the Constitution of this state, and the several statutes relating to publications generally, when it appears that such foreign newspaper contains but a single page printed in English of miscellaneous matter not devoted to the "dissemination of local or telegraphic news and intelligence of a general character."

The only case to which attention has been directed that deals with such a situation, decided by either of the appellate tribunals of this state, is that of Richardson v. Tobin, 45 Cal. 30, wherein, without any particular discussion of the question here under consideraton, it was held that: "Where a statute requires a notice to be published in a daily newspaper, but does not specify a particular language in which it must be published, a publication in a German newspaper, but in the English language, is sufficient." Syllabus.

In other jurisdictions, to the same effect, see Wakeley v. Nicholas, 16 Wis. 588; John v. Connell, 64 Neb. 233, 89 N. W. 806; also Id., 71 Neb. 10, 98 N. W. 457.

In Alfonso v. Alfonso, 99 Misc. 550, 165 N. Y. S. 1037, 1038, it was held that the publication of a summons in Italian in an Italian newspaper was ineffective, even "though both parties to the action were Italian." Nevertheless it was therein said that: "It may be that the justice, in making the order of publication, had the discretion to designate this foreign language newspaper as one 'most likely to give notice to the defendant,' but the publication should have been in English."

On the other hand, in none of the cited cases in either of the other jurisdictions does it appear that the decision therein was made in the light of the provisions of a special statute that contained requirements such as are provided by section 4458 to section 4465, inclusive, of the Political Code of this state; and in that connection it should be specially noted that, although the case of Richardson v. Tobin, 45 Cal. 30, was decided by the Supreme Court of this state in 1872, it was not until the year 1903 that the several special statutes that particularly relate to the question here at issue, and to which statutes attention hereinbefore has been directed, were enacted.

By section 24 of article 4 of the Constitution of this state, in part it is provided that "* * * all laws of the State of California, and all official writings, and the executive, legislative, and judicial proceedings, shall be conducted, preserved, and published in no other than the English language."

And as a further indication of general legislative intent with reference to the language in which the affairs of the state should be conducted, it may not be amiss to note that section 3.40 of the School Code contains a provision by which it is declared that "all schools must be taught in the English language."

As far as may be pertinent to the question here under consideration, in substance section 4458 of the Political Code provides that, "whenever any publication, or notice by publication, or official advertising is required to be given or made," it shall be done "in a newspaper of general circulation"; and by section 4460 of the Political Code such a newspaper is defined as hereinbefore has been set forth. That the purpose of the several statutes to which reference hereinbefore has been had is to require "the publication of legal notices to be published in a newspaper which would reach the general reading public, and which would consequently give notice to the public generally," is attested by practically every decision that has been written upon that subject in this state. As is said in Re Herman, 183 Cal. 153, 164, 191 P. 934, 938: "By the term 'a newspaper of general circulation' the Legislature had in view publications to which the general public would resort in order to be informed of the news and intelligence of the day, editorial opinion, and advertisements, and thereby to render it probable that the 'notices or official advertising' would be brought to the attention of the general public." See, also, In re David, 98 Cal. App. 69, 276 P. 419; In re Monrovia Evening Post, 199 Cal. 263, 248 P. 1017; and authorities respectively there cited.

Practically identical with the language contained in section 24 of article 4 of the Constitution of this state, to which attention hereinbefore has been directed, is the provision in the Constitution of the state of Illinois. Section 18 of the Schedule of the Constitution of 1870. And in the case of Perkins v. Board of Commissioners, etc., 271 Ill. 449, 111 N. E. 580, 590, Ann. Cas. 1917A, 27, in determining the effect of a publication in English of a city ordinance, in a German newspaper, it was held that such publication legally was insufficient. In part, the court there said: "A notice or ordinance published in the English language in a newspaper printed in a foreign language cannot be said to be 'published,' in the sense in which that word is used in the Constitution and laws of this state. Ordinarily such publications are taken and read only by those who understand and read the language in which the publications are printed and who do not readily understand and read the English language. * * *"

Also to like effect is another case in the same state, to wit, People v. Day, 277 Ill. 543, 115 N. E. 732, 734, wherein it appears that an "appropriation bill" was published in a newspaper printed in German, although the appropriation bill itself was printed in the English language. In the body of the opinion rendered by the court it was held that "the circulation of such a paper was necessarily limited, in the main, to persons reading the German language, and that sort of publication is not a compliance with section 18 of the Schedule of the Constitution, nor with the statute providing for publication to furnish information to the citizens generally."

In Conners v. City of Lowell, 209 Mass. 119, 95 N. E. 412, 413, Ann. Cas. 1912B, 627, a publication of an advertisement of sale was printed in English in a French newspaper. Held (syllabus) that, "under Rev. Laws, c. 13, § 1, providing that 'publication of any notice' shall mean the act of printing the notice for a successive number of weeks in a newspaper, etc., an advertisement of a tax sale must be published in English in a newspaper printed in English, and a publication in English of a notice in a French newspaper is insufficient."

In the course of the opinion in that case it is said: "English is the language of this country. This conception is fundamental in the administration of all public affairs. It is an elemental truth, so axiomatic in its nature as to need no supporting authority. It is not declared in the Constitution nor enacted by statute. It is so by the universal customs of our past in colony, province and commonwealth. Apart from the more obvious considerations, there are indications that the English language is that of our institutions in the requirement that no one can be a voter or eligible to office unless able to read the Constitution in English (article 20 of Amendments to Constitution), nor solemnize marriage unless able to read and write in that language. R. L. c. 151, § 30. Instruction in the English language is required in all public and private schools. R. L. c. 42, § 1; Id. c. 44, § 2. It is plain that a general public notice required by law to be published in a newspaper must be printed in English in an English newspaper. The great weight of authority supports this view."

The same principle is announced in many other authorities, including Schaale v. Wasey, 70 Mich. 414, 38 N. W. 317; Tylee v. Hyde, 60 Fla. 389, 52 So. 968; State ex rel. Goebel v. Chamberlain, 99 Wis. 503, 75 N. W. 62, 40 L. R. A. 843; Graham v. King, 50 Mo. 23, 11 Am. Rep. 401; Wilson v. Inhabitants of City of Trenton, 56 N. J. Law, 469, 29 A. 183; State v. City of Jersey City, 54 N. J. Law, 437, 24 A. 571; State v. City of Orange, 54 N. J. Law, 111, 22 A. 1004, 14 L. R. A. 62; Bennett et al. v. City of Baltimore, 106 Md. 493, 68 A. 14, 14 Ann. Cas. 419.

It therefore follows that, in accord with the weight of authority, the newspaper here in question may not be said to be one of "general circulation."

The judgment is reversed.

We concur: CONREY, P. J.; YORK, J.

2 Cal.App.2d 748

In re GROSSMAN.

GROSSMAN v. ARDERY.

Civ. 8291.

District Court of Appeal, Second District, Division 1, California.
Dec. 8, 1934.

Newspapers 🔑3(5)

Newspaper printed in Spanish language, except that comparatively small part was in English, *held* not of "general circulation" within statutes respecting publications (Pol. Code, §§ 4458–4465).

[Ed. Note.—For other definitions of "General Circulation," see Words & Phrases.]

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Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Application of Edgar M. Grossman, publisher, to have the standing of El Heraldo de Mexico, of Los Angeles, Cal., as a newspaper of general circulation, as defined in Political Code, § 4460, ascertained and established, opposed by Roy E. Ardery. From an adverse judgment, contestant appeals.

Reversed.

Stanley F. Maurseth, Hill, Morgan & Bledsoe, and Kenneth K. Wright, all of Los Angeles, for appellant.

Chotiner, Recht & Chotiner, of Los Angeles, for respondent.

Carroll H. Smith, of San Diego, amicus curiæ.

HOUSER, Justice.

The appeal herein is from a judgment by which a newspaper printed in the Spanish language and known as El Heraldo de Mexico was adjudicated a newspaper "of general circulation," within the meaning and intent of the provisions of sections 4458 to 4465, inclusive, of the Political Code.

With the general exception that a comparatively small part of the newspaper in question was printed in the English language, to all intents and purposes the situation of the newspaper in regard to a compliance with the requirements contained in the Constitution of this state and the statute to which reference hereinbefore has been had does not differ from that more particularly set forth in the opinion this day filed in the Matter of L'Italo-Americano (Cal. App.) 38 P.(2d) 810. Relying upon the decision in that case as authority applicable to the facts herein, it is ordered that the judgment be, and it is, reversed.

We concur: CONREY, P. J.; YORK, J.

PEOPLE v. MOORE. *

Cr. 2606.

District Court of Appeal, Second District, Division 1, California.
Dec. 22, 1934.

Hearing Granted by Supreme Court
Jan. 21, 1935.

Homicide 🔑257(1)

Evidence supported conviction for assault with deadly weapon with intent to commit murder.

HOUSER, Acting P. J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Lee Moore was convicted of assault with a deadly weapon with intent to commit murder, and he appeals.

Affirmed.

Lloyd S. Nix, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

HAHN, Justice pro tem.

Defendant appeals from a judgment of conviction rendered by the trial judge, sitting without a jury, of the crime of "assault with a deadly weapon with intent to commit murder," and from the court's order denying his motion for a new trial.

The three points raised on the appeal all go to the general ground of insufficiency of the evidence to support the judgment. While it is true there is no testimony of any eyewitness to the shooting that defendant was the one who fired the shots, there is sufficient circumstantial evidence to bring the crime home to him.

As to the element of "intent to commit murder," the fact that six shots penetrated the body of the victim and other evidence of happenings which preceded the shooting abundantly supports the implied finding that the shots were fired with the intent to commit murder. The testimony offered by defendant in support of his attempt to establish an alibi is subject to the same rules as any other testimony. The record discloses circumstances which justified the court in refusing to believe this testimony. We find no merit in the appeal.

The judgment and order denying motion for a new trial are affirmed.

I concur: YORK, J.

HOUSER, Acting P. J.

I dissent. The material facts upon which the judgment of conviction of defendant was based are that on the day on which the shooting occurred, at an hour between 12:30 and 1:30 o'clock a. m. thereof, but at no time thereafter, defendant was seen at a certain public café and amusement resort; that at such place, but at a time four and one-half hours after defendant had departed therefrom, to wit, at about the hour of 6 o'clock a. m., at which time about 75 other persons were there present, the shooting of the individual whom defendant is charged with having shot took place; and that at about 9:30 or 10:30 o'clock a. m. of the same day defendant was arrested on a charge of driving an automobile while he was intoxicated, at which time he was in the possession of an automatic pistol that, according to "expert" testimony, at most shows was the "gun" from which the shots were fired. The only other pertinent evidence in the case consisted of an explanation by defendant (in which he was largely corroborated by another witness) to the effect that, at about 7:30 o'clock a. m. of the same day on which the shooting occurred, he had bought the "gun" from a man about 6 feet 7 inches tall, by the name of Jerry Hoffman, whom defendant had known for three or four years; also the testimony given by several witnesses, in substance that to their personal knowledge, at the time in ques-

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*For subsequent opinion see 45 P.2d 966.

tion, defendant was not at the scene of the shooting, but that he was in their company at a considerable distance from the café and amusement resort where the shooting occurred. It may also be noted that the identity of the man who actually did the shooting may be inferred from the testimony given by one witness that "in a few seconds" after the shooting occurred he saw "a tall guy running out the back exit where some doors were open"; which testimony is somewhat corroborative of the explanation given by defendant regarding his possession of the "gun" from which the shots were fired, and especially of the identity of the "tall" person from whom defendant purchased the "gun." Nor was any evidence adduced by the prosecution that would tend to show motive for the shooting by defendant. To the contrary, although it appeared that at the instant when the victim was shot he must have been facing the person who shot him, and that the victim received six bullet wounds as a result of the encounter, the victim himself testified in substance that he had not "been doing anything," nor was he "in any argument with anybody previous to the shooting"; that he knew of "no reason for anyone doing it"; that he did not know defendant; that he could not identify defendant as the person who had shot him; and that before the day of the trial of the action against defendant he had never seen defendant.

More simply stated, at most, the substance of the only evidence that tended to prove the guilt of defendant was that four and one-half hours before the shooting occurred defendant was in the locality of, or near the place where, the crime was committed; and that eight hours thereafter he had in his possession the "gun" from which the shots were fired. The fact that the judge before whom defendant was tried elected to disbelieve the explanation given by defendant as to the manner in which and the person from whom he had acquired the "gun," as well as each of the several witnesses by whom defendant presented his "alibi," certainly furnishes no additional incriminating evidence against defendant.

It is of course apparent that, if the evidence was legally sufficient to establish the guilt of defendant as to the commission of the crime of which he was charged, and, instead of the victim of the attack having survived, he had died as a result thereof, on his trial for murder, by the same evidence that was presented on the trial of the instant case, defendant should have been convicted of the crime of murder—a result which to my mind would be, if not unthinkable, at least wholly unjustified.

In my opinion, the evidence adduced by the prosecution was insufficient to support the judgment that was rendered against defendant.

FOX PENINSULA THEATRE et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 9650.

District Court of Appeal, First District, Division 2, California.

Dec. 10, 1934.

Hearing Granted by Supreme Court Feb. 7, 1935.

Master and servant 🔑405(6)

Evidence *held* insufficient to justify compensation award based on average earnings of $25 weekly to 18 year old boy employed intermittently as usher and handbill distributor at 30 cents per hour (St. 1917, p. 842, § 12 (c).

Proceeding for compensation under the Workmen's Compensation Act by Harry Grant, Jr., by his guardian ad litem, Harry E. Grant, opposed by the Fox Peninsula Theatre, a corporation, employer, and the Fidelity & Casualty Company of New York, insurer. The Industrial Accident Commission awarded compensation, and the employer and insurer petition for a writ of review.

Award annulled and proceeding remanded.

R. P. Wisecarver, of San Francisco, for petitioners.

Everett A. Corten, of San Francisco, for respondents.

NOURSE, Presiding Justice.

This is a petition for a writ of review. One Harry Grant, Jr., aged 18, was employed intermittently by Fox Peninsula Theatre as a substitute usher in the city of Burlingame at 30 cents an hour, with the extra duty of distributing handbills occasionally on one day a week at the same rate per hour. While engaged in the latter occupation he was injured. The commission found that the dis-

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*For subsequent opinion see 45 P.2d 709.

ability was 59¾ per cent. permanent, and awarded him $16.25 a week for 239 weeks, based on an average earning of $25 weekly.

The petition is based upon the ground that there is no competent evidence to support the finding of an average earning of $25, and this must be sustained. The evidence as to the wage as an usher and distributor of handbills shows a maximum of $7.50 weekly. The NRA code for a distributor of handbills fixed a minimum of $12 a week and a maximum of $15. The respondents rely wholly upon the testimony of a witness who was engaged in the advertising business in the city of Oakland to the effect that the average wage for a distributor of advertising matter in that city was $3 per day, and that a crew manager might after considerable experience be raised to $4 a day. He thought that a boy starting at 16 years of age and working until 21 should receive $100 a month if he was exceptionally bright.

The petitioners rely upon the express provisions of the Workmen's Compensation Act (St. 1917, p. 831, as amended) covering cases of this character. Section 12(c) (St. 1917, p. 842, § 12(c) provides that, when the injured employee is under 21 years of age, "if such probable earnings after attaining the age of twenty-one years cannot reasonably be determined, such average weekly earnings shall be based upon three dollars a day for a six-day week." The latter part of the section was added to clear the uncertainty noted in Claremont Country Club v. I. A. C., 174 Cal. 395, 163 P. 209, L. R. A. 1918F, 177.

The undisputed evidence is that the employee had been unable to obtain any steady employment. He had worked part time in the Fox Peninsula Theatre while attending school. The distribution of handbills was done occasionally on Saturday when a particular picture was being run. He quit high school in his second year, and worked for a time at sea as a cadet. He was not employed regularly at the time of his injury, but was then studying mathematics with the intention of taking up aviation. He testified that he did not intend to follow the work in the theater and did not intend to work in the advertising business. The amount of the award was based solely upon the testimony of the witness that he "thought" that a bright boy starting at sixteen in the advertising business would not receive less than $100 a month at the age of twenty-one. But the witness had no facts upon which to base this conclusion. From his experience of three years in that business, he testified that he had had 285 boys working under him and that none had been raised above $3 a day; that a grown man, acting as crew manager, might be paid $3.50 or $4 a day with an average of five days a week.

In basing the indemnity on average earnings of $25 weekly, the commission rested its findings on mere conjecture. The case presents a clear example of one in which the probable earnings "cannot reasonably be determined," and for that reason the award should follow the terms of the statute.

The award is annulled, and the proceeding is remanded.

We concur: STURTEVANT, J.; SPENCE, J.

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3 Cal.App.2d 129

LOOP BLDG. CO. v. DE COO.

Civ. 5248.

District Court of Appeal, Third District, California.

Dec. 17, 1934.

1. Assignments 🔑**90**

Assignees of option to purchase corporate stock could rescind and recover part of purchase price paid to seller of stock, where minds of parties never met as to mode of paying balance of purchase price and seller never accepted buyers' proposal to collect such balance from the corporation in satisfaction of its notes held by the buyers.

2. Appeal and error 🔑**174**

Objection that plaintiff's assignees had no capacity to sue inasmuch as assignment was made after commencement of the action was not available on appeal, where no objection was made by assignors and there was no demurrer to the legal capacity of plaintiff to sue, nor was such defense suggested by the answer.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by the Loop Building Company against C. A. De Coo. Judgment for plaintiff and defendant appeals.

Affirmed.

John F. Poole and H. E. Gleason, both of Los Angeles, for appellant.

George S. Hupp and Ray Howard, both of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiff, as assignee of Louis Henry, Roland E. Loop, and Ray Howard, brought this action against defendant to rescind an agreement to purchase certain shares of stock in Interstate Lumber Company, a corporation. Judgment was rendered in favor of plaintiff, and defendant now appeals upon the ground of insufficiency of the evidence to sustain the findings, presenting the issues raised by a bill of exceptions.

It appears that defendant was the owner of more than a majority of the stock of Interstate Lumber Company, and for services rendered in the organization of this company had given to James H. Smith and H. E. Shannon an option to purchase all or a part of this stock. That portion of this option or agreement here pertinent provides: "It is further understood and agreed that C. A. De Coo will sell his stock in the Interstate Lumber Company to any officer of the Interstate Lumber Company in amounts of One Thousand Dollars ($1,000.00) at par value, plus seven per cent (7%) interest from the date of last dividends declared and paid; this to apply to any amount up to forty-nine per cent (49%) of the stock issued, the balance to be sold in one lot."

Thereafter Smith and Shannon assigned to Loop, Henry, and Howard an interest in this option, and a letter was sent defendant by Mr. Howard upon behalf of himself and his associates, together with a check for $1,080. This letter is as follows:

"December 22, 1921.

"Mr. C. A. De Coo, 467 Pacific Electric Building, Los Angeles,

"Dear Sir: Enclosed find check of Mr. Roland E. Loop for $1,080, which together with a check for $4,058.33, to be handed you by Interstate Lumber Company, will make the total sum of $5,148.33. This amount represents the purchase price of Five hundred (500) shares of your Interstate Lumber Company's stock, plus interest at 7% from the date when that Company took possession of the City Lumber Company's yard, which complies with your contract with Mr. J. H. Smith."

At the time in question the Interstate Lumber Company was indebted to Messrs. Henry, Loop, and Howard in the sum of $4,058.33; the same being evidenced by three promissory notes. It is also in evidence that at all of the times herein mentioned appellant was the secretary of and owned practically all of the stock of Interstate Lumber Company.

Subsequently the same parties wrote defendant, of which the following is here material:

"January 13, 1922.

"Mr. C. A. De Coo, 467 Pacific Electric Building, Los Angeles.

"Dear Mr. De Coo: Confirming my telephone conversation with you at your house last Thursday evening, Messrs. Henry and Loop and I expect to present the notes for $4,000 and interest to Interstate Lumber Company, and ask payment to us as payees of the notes, but that this does not mean that we are withdrawing from our arrangement whereby we were to take a block of 500 shares of stock of Interstate Lumber Company on which we sent you a check for $1080."

The balance of $4,000 was never paid defendant, the only attempt toward payment being set forth in the following letter:

"January 10, 1922.

"Mr. C. A. De Coo, 467 Pacific Electric Building, Los Angeles, Calif.

"Dear Mr. De Coo: Confirming our previous conversation, you may consider my previous instructions as to the issuance of $5,000 worth of Interstate Lumber Company, to be modified so that all of the same may be issued to Mr. Roland E. Loop. This is to conform to your ideas that Mr. Loop is the only one of the three persons mentioned in my former letter, Henry, Loop and Howard, entitled to receive the stock under your option. We do not concur in this, but in this instance, it makes no particular difference, since as you know from the reading of Mr. Smith's copy of the contract of October 19, 1921, between Smith, Shannon and Henry, Loop and Howard, all stock purchased by any of said parties is for the joint account of all.

"I understand from you on the telephone that the certificates are all ready for Mr. Smith's signature, and I would suggest that you have the Interstate Lumber Company give you a check for $4,000, with the interest up to date, so as to save further interest. As before stated, I have the notes all ready for surrender to you whenever Mr. Loop or I receive the certificates for 500 shares of stock."

About this time a difference of opinion arose among the officers and directors of the lumber company as to the policy of the company, and particularly as to the granting of certain discounts to plaintiff herein. Defendant being in control of the lumber company then stated that he objected to plaintiff's assignors, holding but a small amount of stock, sitting as directors and having a voice in the management of the concern, and that, unless plaintiff's assignors would agree to take practically all of his stock off his hands, he would not sell them the 500 shares contemplated, but would insist they agree to invest at least $10,000 in the company.

Thereupon, on the day following this meeting, defendant tendered to Loop 100 shares of stock in consideration of the $1,080 already paid. Loop refused to accept 100 shares, and the following letter was then sent defendant:

"February 25, 1922.

"Mr. C. A. De Coo, 467 Pacific Electric Building, City.

"Dear Sir: In view of our failure to agree on future policies at the conference we had last night, upon which we were to wait before going ahead with the purchase of the 500 shares of Interstate Lumber Co. stock, as referred to in my letter of January 13th (your refusal to permit either of us to act as directors with your consent, being anything but a satisfactory policy) and in view of your announcement that you would not abide by the option to purchase your stock, given to Mr. Smith, under which option we contemplated the sale of 500 shares was to be made, unless the purchase of practically all of your stock were financed within ten days—or at least $10,000 worth—which is an arbitrary requirement, not provided for in the option, nor otherwise agreed upon, and in view of your failure to procure the remaining $4,000 and interest from Interstate Lumber Co. on our notes and your statement that you cannot do so (payment by that means being the only manner in which the 500 shares were contemplated to be purchased) we hereby withdraw our proposition to purchase 500 shares of the stock as contained in my letters of December 22, January 10 and January 13, and hereby demand the return of the $1080, and interest thereon, which you have received on account of that contemplated sale.

"In withdrawing from this particular purchase, we do not waive our rights to purchase stock at any other time under the Smith option, our rights thereunder having been heretofore communicated to you.

"Yours truly,

"Roland E. Loop,
"Louis Henry,
"Ray Howard,
"By Ray Howard."

The following day defendant replied thereto as follows:

"February 27, 1922.

"Messrs. Loop, Henry & Howard;

"Gentlemen: Referring to your favors of December 22, January 10, January 13 and February 25, would say I am, as I told you Friday night, ready to comply as soon as the payments of the balance of the money is paid. However, I have no right to ask, or expect, the Interstate Lumber Company to pay to me the money they owe without having the notes you hold against them canceled.

"I have been put to considerable inconvenience, and some actual losses on account of your not completing this deal within a reasonable time, and shall expect to be recompensed for the same.

"Sincerely,

"C. A. De Coo."

Upon the basis of the foregoing correspondence it is the contention of respondent that, upon the failure of defendant to deliver 500 shares of Interstate Lumber Company stock, plaintiff had a right to rescind and is entitled to a return of $1,080 paid upon account therefor.

[1] It is apparent from the evidence and found by the court that plaintiff's assignors entered into a contract to purchase, and defendants agreed to sell, 500 shares of stock of Interstate Lumber Company, of which $1,080 was paid in cash and the balance was to be collected by defendant from the lumber company in satisfaction of an indebtedness by the lumber company to plaintiff's assignors represented by three promissory notes held by them.

Appellant attempted to deliver to plaintiff 100 shares in consideration of the $1,080 received, but the answer does not set up any agreement to purchase 100 shares, and from his testimony it is apparent defendant never accepted the terms of the proposal by plaintiff's assignors that he collect the balance due for the stock purchase from the lumber company. It seems, therefore, that the minds of the parties never met as to the terms and conditions of the sale, and therefore no contract existed as to the purchase and sale of this stock. Under such circumstances respondent is entitled to recover the money paid.

[2] Appellant also contends that plaintiff herein had no capacity to sue inasmuch as the assignment was made after the commencement of this action. No objection to the assignment is made by any of the assignors. In the complaint, duly verified, an assignment is

alleged; that answer, unverified, denied the allegations of the paragraph of the complaint alleging this assignment, which, of course, would not raise the issue. However, it appeared from the testimony the cause of action had been assigned, and, after the action was commenced, a formal written instrument evidencing that fact was executed. An objection was made to the introduction of this testimony and to the assignment, but the objection was made after the evidence was received and was not revived by motion to strike or otherwise. Furthermore, there was no demurrer to the legal capacity of plaintiff to sue nor was such defense suggested in the answer. Other objections of a technical nature were urged, but, in view of our conclusions on the real issue of the case, it is not necessary to pass upon these minor and collateral matters.

The judgment is affirmed.

We concur: PLUMMER, J.; THOMPSON, J.

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3 Cal.App.2d 127

REES et ux. v. CHASE et al.

Civ. 8880.

District Court of Appeal, Second District, Division 2, California.

Dec. 17, 1934.

1. Automobiles ⇨245(24)

In action for death of automobile guest in collision at city street intersection arising directly out of excessive speed, gross negligence of host *held* for jury.

2. Trial ⇨194(16)

Instruction *held* not erroneous as charging on fact question that jury must find defendant's negligence proximate cause of automobile collision, where limited and qualified by succeeding sentence reading, "Before you may render a verdict against him."

3. Death ⇨99(3)

$4,000 to parents for death of 18 year old son *held* not excessive, where $1,412.60 was established by proofs as special damage.

Appeal from Superior Court, Los Angeles County; Erwin W. Owen, Judge.

Action by Walter N. Rees and wife against Bernice Allison Chase and another. From an adverse judgment, defendant P. Earl Parks appeals.

Affirmed.

Lon A. Brooks, of Los Angeles, for appellant.

WILLIS, Justice pro tem.

In the court below respondents sued defendant Bernice A. Chase and appellant P. Earl Parks for damages for the death of their minor son, aged 18 years, as a result of a collision between the automobiles of the respective defendants at a street intersection; the complaint alleging that deceased was a passenger and guest of appellant in his automobile, and that both defendants operated their respective automobiles so carelessly and negligently that a collision resulted. The cause was tried before a jury, which rendered its verdict against both defendants in the sum of $4,000, on which judgment was entered. Appellant moved for a new trial on the statutory grounds, which motion was denied. He alone appeals from the judgment on a record prepared under section 953a of the Code of Civil Procedure.

Appellant's points are: (1) That the evidence is insufficient to support the implied finding of gross negligence on his part; (2) erroneous instructions given at the request of plaintiffs; (3) excessive damages; and (4) error in denying the motion for new trial. No question is raised as to the sufficiency of the complaint to constitute a cause of action based on gross negligence in an automobile guest case.

[1] The transcript of the evidence reveals this to be a case of collision between automobiles at a city street intersection, arising directly out of excessive speed under the circumstances existing at the time and place where it occurred, but with the additional claim herein of gross negligence on the part of appellant; and the case rests on the question of sufficiency of the evidence to support the implied finding of gross negligence. Under the evidence herein, the question whether appellant was guilty of gross negligence was essentially one for the determination of the jury. After carefully reviewing the evidence, we cannot say that there was a lack of evidence upon which to base the jury's conclusions.

[2] Appellant complains of instruction No. 10, given at plaintiffs' request, contending that by its language it sought to charge the

jury on a question of fact; namely, that they must find the negligence of appellant to be a proximate cause of the collision. The portion objected to as a charge of fact is, however, limited and qualified by a succeeding sentence reading, "Before you may render a verdict against him." The instruction, read as a whole, fairly and correctly states the law.

[3] It is also contended that the damages awarded by the jury are excessive. The sum of $1,412.60 was established by proofs as special damage, and the residue of the $4,000 awarded was compensation to the parents of deceased, given under appropriate and correct instructions as to the measure thereof to be used by the jury. We cannot say that the amount awarded for loss of the comfort, society, protection, and earnings of the deceased son, as shown by the evidence, is "obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate consideration of the jury." Van DerHoof v. Chambon, 121 Cal. App. 118, 8 P.(2d) 925, 932.

The motion for new trial was properly denied, and the judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

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3 Cal.App.2d 82

ZULIM v. VAN NESS et al.

Civ. 1350.

District Court of Appeal, Fourth District, California.

Dec. 14, 1934.

Rehearing Denied Jan. 12, 1935.

Hearing Denied by Supreme Court Feb. 11, 1935.

1. **Automobiles** 🔑244(2)

Plaintiff in automobile accident case has burden to establish defendant's negligence by preponderance of evidence.

2. **Automobiles** 🔑245(8)

Negligence of driver of automobile *held* not established as matter of law by mere fact that automobile ran over child's body, but question of negligence was one of fact.

3. **Automobiles** 🔑242(2)

Doctrine of res ipsa loquitur *held* inapplicable to afford presumption of negligence of driver from mere fact that automobile ran over child pedestrian.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Pete Zulim, a minor, by Philip Zulim, his guardian ad litem, against W. H. Van Ness and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

B. M. Benson and Cecil E. Edgar, both of Fresno, for appellant.

Ray W. Hays, of Fresno, for respondents.

JENNINGS, Justice.

The plaintiff, a minor, through his guardian ad litem, instituted this action to recover damages for personal injuries alleged to have been caused by the negligence of the defendants. After the plaintiff had concluded the presentation of his case and had rested, defendants moved the court for a nonsuit. This motion was denied. The defendants then produced the testimony of one witness and rested their case. Thereupon, the defendants moved the court to direct the jury that they should return a verdict in favor of the defendants. This motion was also denied by the court. The jury was then instructed by the court and the cause was submitted to that body for its determination. A verdict was duly returned in favor of both defendants and a judgment in their favor was thereupon rendered in accordance with the verdict. The plaintiff thereafter moved the trial court for a new trial which was denied. Plaintiff has prosecuted this appeal from the judgment.

Appellant does not complain that the trial court erred in any of its rulings made with respect to the admission of evidence or that the court in any respect misinstructed the jury as to the law. The sole contention which is here urged as a reason for the reversal of the judgment is that the facts and circumstances surrounding the accident which resulted in appellant's injuries, as the same were developed by the evidence adduced during the trial, conclusively demonstrate that the verdict of the jury is lacking in evidentiary support. Proper consideration of this contention requires a statement of the facts which were established by the evidence.

On October 12, 1933, at approximately 6 p. m. appellant, a child seven years of age, arrived on foot at the southeast corner of the intersection of Plumas avenue and White's bridge road in the city of Fresno. Appellant was accompanied by his sister Jennie, who was thirteen years of age, and by another sister and brother, whose ages do not appear.

When the children had come to the intersection of the above-mentioned streets, Jennie Zulim told the other members of the party to remain at the southeast corner until she returned. Jennie then crossed over White's bridge road to the northeast corner of the intersection for the purpose of visiting a grocery store which was located on the northeast corner. As she passed across the street, she did not observe any automobiles approaching the intersection from the east. During Jennie's absence the accident which caused appellant's injuries occurred. The direct cause of appellant's injuries appears to have been that the right rear wheel of an automobile passed over appellant's body. This automobile was owned and operated by the respondent Van Ness who was employed by respondent Union Oil Company of California. The testimony of Van Ness as to the occurrence of the accident was in no respect contradicted. He testified that he was en route to his home after leaving the office of his employer in the city of Fresno; that he approached the intersection at approximately 6 p. m. of the above-mentioned date; that it was then growing dark and the lights on his automobile had been turned on; that he approached the intersection at a speed of "probably 20 miles an hour"; that he retarded the speed of his automobile as he entered the intersection and proceeded through it at the rate of approximately 15 miles per hour; that he was looking in the direction in which his automobile was traveling and saw no one in the intersection as he passed into it; that he heard an exclamation and immediately afterward felt that the right rear wheel of the automobile had passed over something; that he brought his car to a stop and alighted from it and then discovered appellant lying in the street near the center of the intersection.

Appellant's contention appears to be that it is the duty of the driver of an automobile to anticipate the presence of pedestrians on the highway; that respondent Van Ness failed in the performance of his duty; that his failure in this regard resulted in the happening of the accident and appellant's resulting injuries; that the evidence entirely failed to indicate that appellant was guilty of any negligence which contributed in any degree to the occurrence of the accident. The conclusion of this line of reasoning is that the verdict in favor of respondents was therefore not warranted by the evidence and that the judgment which was rendered in accordance with the verdict must be reversed.

[1-3] There are certain fundamental legal principles which are applicable to an action of this character which are so firmly established as to require no citation of authorities in their support. This is an action which is based on the alleged negligence of the respondent Van Ness. Since appellant was attempting to fasten liability for his injuries upon Van Ness, it was incumbent upon him to establish the negligence of Van Ness by a preponderance of the evidence. Tower v. Humboldt Transit Co., 176 Cal. 602, 606, 169 P. 227. The question of negligence in a case of this character is a question of fact to be determined by the triers of fact. This question was submitted to the jury under the court's instructions as to which there is here no complaint. The jury found that the respondent Van Ness was not negligent. This determination would appear to be decisive of the present appeal.

In view of the above-mentioned simple legal principles, appellant is forced to the following contention: The very fact that appellant, a pedestrian, was run over, was alone sufficient to convict Van Ness of a breach of the duty to anticipate the presence of pedestrians on the highway and the failure of Van Ness to perform this duty constituted negligence. This argument in the final analysis amounts to a contention that the circumstances surrounding the accident show that Van Ness was guilty of negligence as a matter of law. However, if this contention is here to prevail and the jury's verdict absolving Van Ness from negligence is to be disregarded, it is necessary for a reviewing court to declare that from the uncontradicted facts a reasonable person could draw but one inference, namely, an inference that Van Ness was guilty of negligence in the operation of his automobile at the time and place of the accident. The only fact which would lend any support to such a conclusion is that appellant was run over by the automobile which was then being operated by Van Ness. But here again a fundamental principle of the law of negligence presents an obstacle which cannot be overcome. This principle is stated in 19 California Jurisprudence at page 707, in the following language: "Negligence upon the part of a defendant is not presumed from the mere happening of an accident." See, also, Morton v. Hinds, 113 Cal. App. 437, 440, 298 P. 160; Zohner v. Sierra Nevada L. & C. Co., 114 Cal. App. 85, 90, 299 P. 749. The doctrine of res ipsa loquitur is not applicable to the situation which is here presented and even if it were it would still be a question for the fact triers to determine whether the testimony of respondent Van Ness was sufficient to rebut the inference of negligence which the happening of the accident created. It is our conclusion that the evidentiary facts presented by the record herein are not sufficient to convict the respondent Van Ness of negligence as a matter of law and that this court is not therefore warranted in disregarding the verdict of the jury. Liability was sought to be imposed upon the respondent Union Oil Company of California solely by reason of the fact that Van Ness was an employee of the company and was engaged in the scope of his employment at the time of the accident. A determination that the jury's verdict absolving Van Ness from negligence may not be disregarded necessarily impels the conclusion that the verdict in favor of respondent Union Oil Company of California may not be disturbed.

The judgment is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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2 Cal.App.2d 730

BAKER v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 5244.

District Court of Appeal, Third District, California.

Dec. 10, 1934.

Rehearing Denied Jan. 9, 1935.

1. **Master and servant 🔑405(5)**

Evidence in compensation proceeding *held* to support finding that alleged daughter was not "dependent" of deceased, either on theory that deceased was not man who married petitioner's mother five years after petitioner's birth, or that petitioner was not daughter of such man, or that petitioner was not dependent on deceased for support (St. 1919, p. 917, § 14).

2. **Master and servant 🔑388**

Under statute providing child over 18 not living with parent is dependent only where there is "no surviving dependent parent," claimant having surviving parent on whom he may rely for support may not be deemed "dependent" of deceased parent so as to entitle him to compensation (St. 1919, p. 917, § 14, subd. 2).

[Ed. Note.—For other definitions of "Dependent; Dependency," see Words & Phrases.]

Writ of Review to Superior Court, Sacramento County.

Proceeding under the Workmen's Compensation Act by Lillian Baker for the death of her alleged father, David Keeley, opposed by the Sacramento River Lines, employer, and the Firemen's Fund Indemnity Company, insurer. From an order denying compensation, petitioner brings proceeding for review.

Award affirmed.

Anson H. Morgan, of Sacramento, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is a proceeding to review the award of the Industrial Accident Commission wherein it is found that the petitioner was not a dependent of David Keeley, deceased, within the meaning of section 14 of the Workmen's Compensation, Insurance and Safety Act of California (St. 1917, p. 844, as amended by St. 1919, p. 917).

The Industrial Accident Commission found that David Keeley was drowned December 17, 1933, while he was engaged in the course of his employment with the Sacramento River Lines; that the Firemen's Fund Indemnity Company was then the insurer of his employer; and that "the evidence does not establish that the applicants herein were dependents of said deceased." There is no finding that the petitioner, Lillian Baker, is the surviving daughter of David Keeley or that she is "physically or mentally incapacitated from earning," or dependent for support upon the deceased, or that she was living with him at the time of his death, or that there is "no surviving dependent parent." Compensation was denied the petitioner. A petition for rehearing was also denied. From the order denying compensation to the petitioner she has brought this proceeding.

It is contended that David Kili Ionakana, who is an Hawaiian, is the father of the petitioner. It is assumed that David Kili Ionakana is the same person as David Keeley, deceased. We are pointed to no evidence, and a careful examination of the entire record discloses no evidence, that the identity of these two individuals is the same. The petitioner was born June 23, 1908. Prior to her birth, her mother was living with one Brewster, to whom she was not then married. The mother of petitioner did not marry Ionakana until 1913. At the time of the petitioner's birth in 1908, her birth certificate was certified by the attending physician and filed, in which the name of Albert W. Brewster was named as her father. She was also designated therein as a "white" child. It is true that after this application for an award of indemnity was filed with the commission in 1934, the same physician signed a statement that when he certified to the birth certificate of this petitioner, he was "sure there was some mistake in names" and that David K. Ionakana acknowledged to him that he was the father of the child. It also appears that the mother of petitioner filed a suit for divorce against David Kili Ionakana in 1918, in which she alleges that the only issue of their marriage was one ten year old daughter by the name of Lillian. The decree of divorce is not in this record, but it is stipulated that the interlocutory decree awarded the custody of this petitioner to her mother and that an award of $25 per month was rendered against the defendant in that suit. It also appears that the mother of this petitioner gave birth to three other children one of which is acknowledged to have been illegitimate. The others are not accounted for. Nor does it appear that the mother married Mr. Brewster after her divorce from Ionakana, although she became a witness at the hearing of this case under the name of Brewster.

[1] There is substantial evidence to support the finding of the commission that the petitioner is not dependent on David Keeley for support, both upon the theory that David Keeley, the deceased, is not the same individual as David Kili Ionakana, who became the husband of petitioner's mother five years after her birth, and also on the theory that there is no satisfactory evidence that the petitioner is the surviving daughter of David Kili Ionakana.

Assuming, however, that the petitioner is the surviving daughter of David Kili Ionakana, and that he is the same individual as David Keeley, deceased, we are of the opinion there is ample evidence to sustain the finding of the commission that she was not dependent upon him for support at the time of his death. The petitioner was twenty-five years of age at the time of the death of David Keeley. She married William Baker in 1929, but was separated from him about a year later. They were not divorced. There is evidence that she subsequently lived with at least two other men, and that she kept a rooming house, the rent for which was paid and a portion of her maintenance provided by men who lived in that house. The mother was unsuccessful in attempting to prevent her daughter from living in this dissolute fashion.

[2] There is a certificate from a physician that the petitioner suffers from anemia with a resulting loss of weight and strength, and that he believes she is unable to "work and make a living for herself." But it does appear that she maintained herself independently of the support of her parents, except that she testified that her father gave her $45 a month for some time before his death. The commission was warranted in doubting her statement that he gave her $45 a month for the reason that it appears he drank to excess and gambled, and that his average income for the year preceding his death was but $78.75 per month. Moreover, the petitioner was not living with David Keeley at the time of his death, and there is no showing that her mother is not amply able to support her if necessary. Under section 14, subd. (a) (2) of the Workmen's Compensation Act, a child over the age of 18 years, who is not living with the parent on account of whose injury or death he seeks to secure compensation, is deemed to be dependent for support on the injured or deceased parent only when there is "no surviving dependent parent." While the meaning of the preceding term, "no surviving dependent parent," is obscure, it seems evident that the Legislature intended thereby to assert that where a claimant has a surviving parent upon whom he may rely for support, he may not be deemed to be a dependent within the meaning of the act so as to entitle him to compensation on account of the death or injury of the employee.

The evidence of the petitioner's dependency upon David Kili Ionakana for support is very unsatisfactory. We are persuaded the record amply supports the finding of the commission that the petitioner was not dependent on the deceased for support.

The award is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

2 Cal.App.2d 696

PEOPLE v. CARAVA.

Cr. 2589.

District Court of Appeal, Second District, Division 2, California.

Dec. 8, 1934.

1. Homicide 🔑229

Evidence that name and description of deceased on whom surgeon performed autopsy was identical with that of person assailed by accused sustained finding that deceased was victim of assault of accused (Code Civ. Proc. § 1963).

2. Criminal law 🔑865(2)

Permitting jury to deliberate from 2:15 p. m. until 4:52 p. m. on following day with suspension of deliberations from 10 p. m. of first day to 9 a. m. of next day *held* within discretion of trial court (Pen. Code, § 1140).

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Jack Carava was convicted of manslaughter, and he appeals.

Affirmed.

A. Brigham Rose, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Defendant had an altercation with a Chinaman in a produce market, which culminated when he struck the latter in the head. The Chinaman was taken to the receiving hospital and thence to a private hospital, where he died the following day from basal fracture of the skull. Defendant was convicted of manslaughter. From judgment of conviction and order denying motion for new trial, he appeals on the grounds that the evidence was insufficient, that the jury was coerced into reaching a verdict by being required to deliberate too long before agreeing, and that the court's charge to the jury did not include certain instructions requested by defendant.

[1] An examination of the transcript of the testimony shows that the evidence amply supports the jury's verdict. Appellant urges that the deceased concerning whom the autopsy surgeon testified may not have been the person alleged to have been assailed by him. The name and description was identical. "Identity of person is presumed from identity of name. Section 1963, Code Civ. Proc. While the presumption is a disputable one, there is no evidence in the record here tending to controvert it." People v. Mullen, 7 Cal. App. 547, 94 P. 867. The presumption will therefore prevail. The circumstances herein justified, if they did not compel, the conclusion of the jury as to the identity of the deceased as the victim of the assault.

[2] The case was submitted to the jury Friday at 2:15 p. m. They suspended their deliberations from 10 p. m. of that day to 9 a. m. Saturday, and arrived at a verdict at 4:52 p. m. on the latter day. The time required for such deliberation was not unduly long, and the court properly exercised the discretion vested in it in conformity with Pen. Code, § 1140.

The jury was fully and correctly instructed. The additional instructions offered by appellant and refused contained no essential elements which were omitted from the court's charge or which the defendant had a right to require the court to give.

Judgment and order affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

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3 Cal.App.2d 103

DONOVAN v. HORNADAY et ux.

Civ. 8869.

District Court of Appeal, Second District, Division 2, California.

Dec. 15, 1934.

Automobiles 🔑244(37)

Evidence that pedestrian while crossing street after dark on pedestrian crosswalk was struck by motorist traveling at speed of 17 to 30 miles per hour *held* sufficient to support implied finding that motorist's negligence was sole proximate cause of accident.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Madeline Charrion Donovan against Paul F. Hornaday and wife. Judgment for plaintiff, and defendants appeal.

Affirmed.

Talbot, Hornaday & Hodges, of Los Angeles (Leon K. Jonas, of Los Angeles, of counsel), for appellants.

Bernard Potter and Vernon Cruickshank, both of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff recovered judgment for injuries resulting from an accident in which she was struck by an automobile driven by defendant Mary B. Hornaday. The sufficiency of evidence and propriety of instructions are the sole questions raised on this appeal.

The accident occurred after dark at Fourth and Spring streets, in Los Angeles. Plaintiff left the northeast corner, and started westerly across Spring street in a pedestrian crosswalk. When at or near the most easterly rail of the north-bound street car tracks she was struck by defendant's automobile, which was traveling at a speed estimated at 17 to 30 miles per hour. There was ample evidence to support the implied finding that the defendant's negligence was the sole proximate cause of the accident and of plaintiff's injuries.

The jury was fully and correctly informed as to the law by the court, by instructions which embraced the theory of both sides, and it does not appear that any of the instructions given could have confused or misled them. Nor does it appear that any of the instructions refused would have assisted the jury in its deliberations or have led to any result other than that attained.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

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2 Cal.App.2d 720

DEMPSEY et al. v. STAR HOUSE MOVERS, Inc., et al.

Civ. 8905.

District Court of Appeal, Second District, Division 2, California.

Dec. 10, 1934.

1. Trial 🔑165

While evidence of defendant called under statute to testify is not binding on plaintiff, it is evidence to be considered with other evidence in light most favorable to plaintiff in determining motion for nonsuit (Code Civ. Proc. § 2055).

2. Automobiles 🔑308(7)

In action for death of motorist colliding with house being moved on highway, evidence as to lights on defendant's truck and on house and as to warning given deceased *held* to make question for jury.

3. Automobiles 🔑308(2)

Where only witness to accident called by plaintiffs was defendant called under statute, there was no evidence binding on plaintiffs on basis of which trial court could hold deceased motorist guilty of contributory negligence as matter of law and grant nonsuit (Code Civ. Proc. § 2055).

◆

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Leonore Dempsey and others against the Star House Movers, Inc., and another. From an adverse judgment, plaintiffs appeal.

Reversed.

Harry D. Parker and Raymond G. Stanbury, both of Los Angeles, for appellants.

Sherman & Sherman, of Los Angeles, for respondent Star House Movers, Inc.

SCOTT, Justice pro tem.

Plaintiffs, heirs at law of James P. Dempsey, brought this action for wrongful death of the latter which occurred when the automobile driven by him collided with a house being moved on the highway by defendants. From judgment of nonsuit, plaintiffs have appealed.

At 2:30 a. m. on a dark night deceased was driving north on Broadway in Los Angeles county near One Hundred and Twenty-eighth street. The paved road was 30 feet wide with dirt shoulders. Defendants were moving a house 28 feet 4 inches wide, going south. The house was pulled by a truck, the headlights of which were 36 feet in front of the house. The center of the truck and of the house was in the center of the road, the bottom of the house being 4 feet above the pavement. The only witness to the accident called by plaintiffs was the defendant Martin, called under Code of Civil Procedure § 2055. He testified that the truck's headlights were lighted and that there were two red lanterns and one white lantern hanging together at the left front corner of the house; that as deceased approached within 250 feet, Martin waved a red lantern at him; and that deceased swerved to the right as he passed the truck and then collided with the corner of the house.

[1-3] While evidence of a defendant under section 2055, Code of Civil Procedure, is not binding on the plaintiff, nevertheless it is evidence in the case, to be considered together with any other evidence in the light most favorable to plaintiff when the court is determining a motion for nonsuit. Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529. Where, as in this case, a reasonable man might have concluded from the testimony of such witness that defendants had not exercised a degree of care commensurate with the hazard which they had created, it became a question of fact for the jury. Stockton Automobile Co. v. Confer, 154 Cal. 402, 97 P. 881; Hoff v. Los Angeles Pacific Co., 158 Cal. 596, 112 P. 53. There was no evidence binding on plaintiffs on the basis of which the trial court could hold that deceased was guilty of contributory negligence as a matter of law. The motion for nonsuit should have been denied. Marchetti v. Southern Pacific Co., 204 Cal. 679, 269 P. 529.

Judgment reversed.

We concur: STEPHENS, P. J.; CRAIL, J.

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2 Cal.App.2d 669

Ex parte PHAIR.

Cr. 2627.

District Court of Appeal, Second District, Division 2, California.

Dec. 7, 1934.

1. **Habeas corpus 🔑4**

Where sentence was excessive, defendant could await expiration of legal term and apply for habeas corpus, or could have sentence corrected through appeal (Pen. Code, § 19a, as added by St. 1933, p. 2217).

2. **Criminal law 🔑1216 (1)**
Habeas corpus 🔑28

Where defendant, whose sentence for misdemeanor exceeded statutory one-year period, had sentence corrected through appeal, trial court *held* unauthorized to impose sentence of one year from date of resentence, justifying habeas corpus after one year's imprisonment (Pen. Code, § 19a, as added by St. 1933, p. 2217).

◆

Petition by Gordon Phair for a writ of habeas corpus to obtain his release from the Los Angeles county jail.

Petition granted.

Aileen M. MacLymont, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for the respondent.

STEPHENS, Presiding Justice.

Petitioner seeks to be released from the Los Angeles county jail by the writ of habeas corpus claiming that he is illegally imprisoned.

Phair was convicted in four counts of a misdemeanor in the superior court and was sentenced to the county jail for the period of two years for each count. The sentence was reversed by this court (People v. Gordon Phair, 137 Cal. App. 612, 31 P.(2d) 421), and the case was sent back to the trial court for resentence for the reason that section 19a of the Penal Code, as added by St. 1933, p. 2217, limits the total sentence in such cases to the period of one year.

The period of one year from the date of the first sentence had not elapsed when the court under the order just adverted to again pronounced a sentence of one year from date of resentence upon petitioner. Petitioner had been in the county jail under sentence for more than one year from the date of the first sentence when he filed the instant petition, and for that reason claims that he is being illegally imprisoned. His claim would seem to be well founded. The applicable portion of section 19a is as follows: "In no case shall any person sentenced to confinement in a county or city jail on conviction of misdemeanor, or as a condition of probation, or for any reason, be committed for a period in excess of one year." The court had a right to commit petitioner for one year upon the first sentence, and for that reason the sentence was not void.

[1, 2] Petitioner had two courses open to him; one to await the expiration of the legal term and apply for release on habeas corpus (In re Morck, 180 Cal. 384, 181 P. 657), or the one he took to have the sentence corrected through appeal. His imprisonment has been one continuous imprisonment under

commitment for misdemeanor, and, the year having expired, he is entitled to the writ ordering his release.

The petition for the issuance of the writ of habeas corpus is granted.

We concur: CRAIL, J.; SCOTT, Justice pro tem.

3 Cal.App.2d 44

ZAHNISER v. WHITE et al.

Civ. 1175.

District Court of Appeal, Fourth District, California.

Dec. 13, 1934.

Appeal and error 🔑554(2)

Appeal was dismissed where, on expiration of period within which record might be filed under either statutory method of appeal, no bill of exceptions had been settled and no transcript prepared (Code Civ. Proc. §§ 650, 953a; Rules for Supreme Court and District Courts of Appeal).

◆

Action by Ellis C. Zahniser against Jane Doe White and another. From the judgment, plaintiff appeals. On motion to dismiss the appeal.

Appeal dismissed.

A. P. Michael Narlian, of Los Angeles, and Edgar E. Hendee, of San Diego, for appellant.

Maurice M. Myers, of Oceanside, for respondents.

JENNINGS, Justice.

This motion to dismiss the appeal herein is supported by the certificate of the county clerk, and the facts therein stated are not contradicted. It is thereby made to appear that the only step in furtherance of the appeal which has been taken by appellant was the filing of a notice of appeal on April 19, 1933. No bill of exceptions has been settled, as provided in section 650 of the Code of Civil Procedure, and no transcript has been prepared in accordance with the provisions of section 953a of said Code. The statutory period within which a record may be filed on appeal under either of the methods of appeal provided for by the Code of Civil Procedure has expired. It follows that the motion should be granted. People v. Berkeley Chiropractic College, 103 Cal. App. 139, 283 P. 981; rule V of the Rules for the Supreme Court and District Courts of Appeal.

The appeal is dismissed.

We concur: BARNARD, P. J.; MARKS, J.

2 Cal.App.2d 701

THOMAS et al. v. SMITH et al.

Civ. 8857.

District Court of Appeal, Second District, Division 2, California.

Dec. 8, 1934.

1. **Action** 🔑50(3)
   Trial 🔑335

Cause of action of wife for personal injury and of husband for consequential damage *held* properly joined, and defendants were not entitled as of right to have separate awards segregated in verdict or judgment (Code Civ. Proc. § 427).

2. **Costs** 🔑18

Where cause of action of wife for personal injury and of husband for consequential damage were properly joined, fact that judge permitted separate verdicts and judgments, each judgment being for less than $2,000, did not deprive plaintiffs of costs, where combined judgment exceeded $2,000 and hence was beyond municipal court's jurisdiction (Code Civ. Proc. §§ 427, 1022).

◆

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Winifred Thomas and husband against Harold H. Smith and another. Separate judgments for plaintiffs. From an order denying defendants' motion to strike out the cost bill, defendants appeal.

Affirmed.

Paul Nourse, of Los Angeles (J. Howard Edgerton, of Los Angeles, of counsel), for appellants.

Clyde C. Shoemaker, of Los Angeles (Winthrop O. Gordon, of Los Angeles, of counsel), for respondents.

SCOTT, Justice pro tem.

Plaintiffs, husband and wife, sued for damages resulting from an automobile accident. The jury returned a verdict for William Thomas for $1,041 and a separate verdict for Winifred Thomas for $1,500. Separate judgments were thereupon entered for said amounts. Upon filing of cost bill defendants moved to strike it on the ground that each judgment was for less than $2,000. From order denying such motion, they appeal.

[1, 2] The two causes of action, to wit, that of the wife for personal injury and of the husband for consequential damage, were properly joined under section 427 of the Code of Civil Procedure. Appellants were not entitled as a matter of right to have the separate awards segregated in the verdict or judgment. Bock v. Hamilton Square Baptist Church, 219 Cal. 284, 26 P.(2d) 7. The fact that the trial court permitted such a divided verdict and judgment cannot operate to deprive plaintiffs of the costs to which they are entitled under section 1022 of the Code of Civil Procedure, since the total judgment was over $2,000 and was in excess of the jurisdiction of the municipal court.

Order affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

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2 Cal.App.2d 670

PEOPLE v. SIMEONE et al.

Cr. 2609.

District Court of Appeal, Second District, Division 2, California.

Dec. 7, 1934.

Criminal law ⚷1182

Appeal from judgment on conviction, supported by sufficient evidence, after correct instructions, *held* without merit, where appellant's counsel was granted leave to withdraw from case and no briefs were filed within time required (Pen. Code § 1253).

◆

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Albert Simeone and others were charged with an offense, and James Duke was convicted of first-degree burglary and kidnaping, and he appeals. On the people's motion to affirm.

Judgment affirmed.

Willis T. Lyman, of Long Beach, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, of Los Angeles, for the People.

STEPHENS, Presiding Justice.

Defendant Duke was convicted of first-degree burglary and two counts of kidnaping. He gave notice of appeal from the judgment. Appellant's counsel appeared in open court and requested leave to withdraw from the case. Such permission was granted. Respondent moves to affirm under Penal Code, § 1253. No briefs have been filed and time for filing opening brief has long since expired.

We have examined the evidence and find it to be sufficient. The instructions were correct. It is clear that the appeal is without merit.

Judgment affirmed.

We concur: CRAIL, J.; SCOTT, Justice pro tem.

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2 Cal.App.2d 614

LOS ANGELES COUNTY v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 9993.

District Court of Appeal, Second District, Division 2, California.

Dec. 5, 1934.

Master and servant ⚷364

Applicant for relief, given work order as part of his aid, to be paid from welfare funds, *held* not "employee" within Workmen's Compensation Act while performing work pursuant to order (St. 1933, p. 2005, § 1, and pp. 809, 2613, 2615, and §§ 8 (a), 12½).

[Ed. Note.—For other definitions of "Employee," see Words & Phrases.]

◆

Proceedings under the Workmen's Compensation Act by John Morris Jones, opposed by the County of Los Angeles. The Industrial

Accident Commission awarded compensation and the county petitions for writ of review.

Award annulled.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Dep. Co. Counsel, both of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondent Commission.

SCOTT, Justice pro tem.

On September 13, 1933, respondent Jones applied to the department of charities of Los Angeles county for aid. His application was allowed and aid was granted to him as an "open welfare case" in the form of food, shelter, and incidental cash. On November 21, 1933, he was given a work order for five days of six hours a day at 40 cents an hour, as a part of his aid, to be paid out of welfare funds in said charities department. Three days later, while occupied with work pursuant to the work order, he broke a bone in his right hand, for which respondent commission awarded him compensation.

Act 5815, section 1, Deering's General Laws (1933 Supp., p. 2042, St. 1933, p. 2005), in effect August 21, 1933, provides that such work may be required as a condition of relief. The work was given respondent Jones as a matter of relief, and he was not an employee under the Workmen's Compensation Act. McBurney v. Industrial Accident Commission, 220 Cal. 124, 30 P.(2d) 414. The case comes squarely within the provisions of section 8(a) of that act (St. 1917, p. 835), as amended in 1933 (Deering's Gen. Laws, 1933 Supp., p. 1831, St. 1933, pp. 809, 2613), which excludes from the definition of "employee" those who "perform services in return for aid or sustenance only." Section 12½ of that act (St. 1917, p. 831), added in 1933 (Deering's Gen. Laws, 1933 Supp., p. 1834, Act 4749, St. 1933, p. 2615), does not bring within the definition of "employee" one who is performing services as in this case. The words "where an employee is injured while engaged on any unemployment work relief program" cannot be construed as meaning "where one is engaged on any unemployment relief program he becomes thereby an employee within the meaning of this act, notwithstanding the provisions of section 8(a) hereof." If the Legislature intended to enact in substance a section having the meaning which respondent commission seeks to attribute to it, it has failed in its purpose, and the omission will have to be supplied, if at all, by further enactment rather than by a construction not warranted by the language used.

Award annulled.

We concur: STEPHENS, P. J.; CRAIL, J.

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2 Cal.App.2d 632

VAN HAAREN v. WHITMORE et al.

Civ. 9453.

District Court of Appeal, First District, Division 1, California.

Dec. 6, 1934.

1. Trial 🔑51

Where trial court reserved ruling upon evidence to show existence of contemporaneous oral agreement that third party was to be real obligor on note until final submission of case, its subsequent finding against makers upon issue of liability to which evidence was directed was in effect a ruling excluding such evidence.

2. Evidence 🔑418

Extrinsic evidence is not admissible to avoid liability of maker who signs unambiguous note in his individual capacity, though he was acting in representative capacity for another.

3. Evidence 🔑418

Where it is contended that note is not that of maker but of another, it must appear from instrument itself that its true object and intent are to bind principal alone before maker can escape personal liability.

4. Evidence 🔑397(2)

When parties have deliberately put their agreement in writing, in such language as imports a legal consideration, conclusive presumption exists that whole engagement and extent and manner of their undertaking is there expressed.

5. Evidence 🔑441(11)

Makers who signed unambiguous note in their individual capacities and failed to indicate therein existence of their principal *held* personally liable thereon, though makers claimed existence of contemporaneous oral agreement with payee that third party was to be real obligor on note.

6. Bills and notes 🔑92(6)

Detriment suffered by landowner in parting with title to her property *held* sufficient consideration to grantees for their note for part of purchase price, though grantees passed title on to another without profit.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Rose P. Van Haaren against William T. Whitmore and others. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

John C. Scott, of Oakland, for appellants.

Donahue, Hynes & Hamlin, of Oakland, for respondent.

JONES, Justice pro tem.

This is an appeal from a judgment for the balance due on a promissory note secured by a deed of trust. The trial court gave judgment in favor of the plaintiff for the balance alleged to be due on the note, and the defendants have appealed.

The record discloses that two of the defendants, Jennie Whitmore and Dr. Charles B. Moon, entered into a written contract with the plaintiff on the 21st of October, 1929, to purchase from her a parcel of real property improved with an apartment house and to pay her $12,000 therefor, $1,800 in cash, and the balance of $10,200 by a note secured by a deed of trust on the property. Subsequently, and on October 25th of the same year, the plaintiff conveyed the property to said defendants; and all the defendants, the contracting defendants and their respective spouses, executed and delivered to her the note and deed of trust.

In the month of November following, the defendants conveyed the property by deed to the Fruitvale Spiritual Church. The appellants admit the execution and delivery of the contract, deed, note, and deed of trust, and also that the amount for which judgment was given in the trial court was the unpaid balance on the note after the application of the proceeds from the sale under the deed of trust.

Two defenses have been raised to the action: (1) That the defendants received no consideration for the note; and (2) that there existed a contemporaneous oral agreement whereby they were to buy the property for the Fruitvale Spiritual Church and that the church was to be the real obligor upon the note and not the defendants.

[1] The Fruitvale Spiritual Church is not mentioned in or made a party to the note, or any of the other instruments involved in the transaction. Neither is it contended that there is anything about any of the documents by which the transaction was consummated, including the note sued on, which would indicate that the defendants executed the note for or on behalf of a principal. Considerable evidence was offered by the defendants, and admitted by the trial court subject to objection, for the purpose of showing that they were at all times acting not for themselves but for the church, and that this fact was well known to the plaintiff at the time the note was executed, and that she acquiesced in the arrangement by accepting the initial payment on the property from the church and subsequent payments on the note. Nothing appears from the evidence so admitted to indicate that any deceit was practiced upon the defendants by the plaintiff, or that she acquired any undue advantage over them by reason of mistake or otherwise. The evidence so admitted tends only to establish a contemporaneous oral agreement that the church was to be the real obligor on the note, and that the defendants were acting for it in the transaction. The trial court reserved its ruling upon this evidence until the final submission of the case, and its subsequent finding against the appellants upon the issue to which the evidence was directed was in effect a ruling excluding the evidence. Citizens' Bank of Los Angeles v. Jones, 121 Cal. 30–32, 53 P. 354.

[2-5] The rule is well established that extrinsic evidence is not admissible to avoid the liability of the maker of a promissory note who signs in his individual capacity, even though he was acting in a representative capacity for another at the time, when the note is not uncertain, doubtful or ambiguous. Crocker National Bank v. Say, 209 Cal. 436, 288 P. 69; Williams v. Silverstein, 213 Cal. 269–276, 2 P.(2d) 165. Where, as here, it is contended that the note is not that of the defendants, but of another, it must appear from the instrument itself that the true object and intent of it are to bind the principal and not the person who signed the note, before he can escape personal liability. Hobson v. Hassett, 76 Cal. 203, 18 P. 320, 9 Am. St. Rep. 193. When the parties have deliberately put their agreement in writing, in such language as imports a legal consideration, it is conclusively presumed that the whole engagement and the extent and manner of their undertaking is there expressed. Lindemann v. Coryell, 59 Cal. App. 788, 212 P. 47. Since the defendants signed the note and wholly failed to indicate therein if

they had a principal, or who or what the principal was, they have made themselves personally responsible for its payment.

[6] The contention that the defendants received no consideration for the note cannot be maintained. The plaintiff parted with the title to her property to them, and the detriment suffered by her in that behalf is sufficient, even though the defendants passed the title on to another without profit.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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2 Cal.App.2d 568

JEANNERETTE v. TAYLOR et ux.

Civ. 8991.

District Court of Appeal, First District, Division 1, California.

Dec. 4, 1934.

Hearing Denied by Supreme Court Jan. 31, 1935.

1. Deeds 🔑59(1)

Delivery of deed to title company for limited purpose of recordation did not confer authority to deliver deed, and hence company's act in mailing deed to prospective vendee did not pass title to land.

2. Estoppel 🔑118

Evidence sustained finding that owner of land acting through agent she trusted caused record title of land to appear in name of prospective vendee who advanced money in reliance upon record title, and hence loss resulting from agent's fraud fell on owner (Civ. Code § 3543).

3. Trial 🔑139(1), 140(1)

Rule that credibility of witnesses and weight of their testimony are questions exclusively for jury or trial court is inapplicable where testimony is in light of circumstances inherently improbable (Code Civ. Proc. § 1847).

4. Mortgages 🔑38(1)

In action to quiet title, evidence established that defendant to whom record title of lot worth $2,000 was conveyed, through fraud of plaintiff's agent, advanced $900 as loan upon security of record title and not as purchase price of lot, and hence judgment that defendant was entitled to decree quieting title to lot in him in case of nonpayment of loan with interest was erroneous.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Marie Jeannerette against J. Hartley Taylor and wife, in which the named defendant filed a cross-complaint. From an adverse judgment, the plaintiff appeals.

Reversed, with directions.

Waldo, Hinds & Lawrence, of Pasadena (Cornelius T. Waldo, of Pasadena, of counsel), for appellant.

Brooks Gifford, of Pasadena (T. W. Ward, of Pasadena, of counsel), for respondents.

PER CURIAM.

An action to cancel a deed and to quiet plaintiff's alleged title to a certain lot in Los Angeles county or, in lieu thereof, to recover the value of the property.

Defendant J. Hartley Taylor by his cross-complaint also sought to quiet his alleged title thereto against plaintiff.

The plaintiff on May 9, 1930, was the owner of the lot. On or about that date one Simmons, who is a nephew of said defendant, represented to plaintiff that he could sell the property to defendant for $2,700. Plaintiff agreed to sell, it being the understanding that Simmons should receive $700 from the selling price. Whether this was to be a loan or by way of commission is not clear from the testimony. Later a title company, following plaintiff's instructions, recorded a deed to the property which she had signed and acknowledged; the defendant being named therein as the grantee. Following this the title company prepared a certificate, showing the record title to be in defendant. The company also mailed the recorded deed to defendant. The evidence shows that this was done without express authority. The certificate was delivered to defendant, and it may fairly be inferred from the testimony that this was authorized by the plaintiff. Previous to this Simmons, representing himself to be the owner of the lot, had applied to the defendant for a loan of $900. According to the defendant's testimony at the trial he refused to make the loan, but agreed to purchase the lot for that amount and give Simmons an option to repurchase it within four months, and the trial court so found. Defendant also testified that this sum was to be paid to Simmons when the record title should be in defendant. Defendant was not acquainted with the plaintiff, and when he received the deed and certificate he paid

Simmons the above sum, no part of which was paid to the plaintiff.

The court found that the lot was reasonably worth $2,000, and that defendant in reliance upon the recorded deed purchased the property for a valuable consideration without knowledge of any claim thereto by plaintiff. Judgment was entered quieting title in the defendant unless the plaintiff within a time fixed should pay into court for defendant's benefit the sum of $900 with interest, less certain taxes which had been paid thereon. The plaintiff has appealed from the judgment.

[1, 2] No one who had possession of the deed was authorized by plaintiff to deliver the same to the defendant. The delivery to the title company was for the limited purpose of recordation. No authority was thereby conferred to make delivery, and its act in mailing the instrument to the defendant did not have the effect of passing title. MacDonald v. Cool, 134 Cal. 502, 66 P. 727; Ernst v. Searle, 218 Cal. 233, 22 P.(2d) 715; Keele v. Clouser, 92 Cal. App. 526, 532, 268 P. 682. However, evidence which the court believed shows that plaintiff through misplaced confidence in Simmons, with whom she had had previous transactions, caused the record title to appear as stated, and that the defendant as a prudent man might reasonably be and was led to believe that the transaction was free from fraud and that he could in reliance thereon advance the agreed sum.

Where one of two innocent persons must suffer from the act of a third, he through whose negligence it happened must bear the loss. Civ. Code, § 3543. Here both were innocent of fraud; but the injury having been caused by the acts of plaintiff's agent, in whom had been placed the power to perpetrate the fraud, she should bear the loss. This was the view of the trial court, and its conclusion is fairly supported by the evidence.

[3, 4] However, the court's conclusion that the defendant intended to purchase the property is in our opinion not sustained. The value of the lot as found by the court was more than twice the amount paid to Simmons by the defendant. Shortly after the transaction Simmons was prosecuted criminally for his part therein. At a hearing on this charge, which was held approximately two years before the trial of the case at bar, the defendant was sworn as a witness and related in detail his version of the transaction. His testimony then given reasonably supports but one conclusion, viz., that the amount paid to Simmons was a mere loan to be secured by a record title to the lot, and this in substance was defendant's statement to the plaintiff subsequently, and this he admitted at the trial. While as a rule the credibility of witnesses and the weight to be given their testimony are questions exclusively for the jury or the trial court (Code Civ. Proc., § 1847), yet it has been held that where the testimony as to a particular fact is in the light of the circumstances inherently improbable, the rule does not apply. County of Sonoma v. Stofen, 125 Cal. 32, 57 P. 681; De Arellanes v. Arellanes, 151 Cal. 443, 90 P. 1059. In view of the above, defendant's version of the affair as related at the trial must have been based upon a faulty recollection of the true facts; and although, as he testified, he was to receive a deed to the property, nevertheless it is clear that the conveyance was made merely as security. Although we are satisfied that the trial court was justified in concluding that the defendant acted in good faith, believing that the transfer of the title was regular, nevertheless, in view of our conclusion that the most he can claim is a lien for the amount loaned to Simmons, the judgment, in so far as it decrees that the defendant in case of nonpayment of the loan with interest, less the taxes, shall be entitled to a decree in his favor quieting title thereto, is erroneous.

The judgment is accordingly reversed, and the trial court is directed to enter its decree adjudging the plaintiff to be the owner of the lot subject to a lien thereon in favor of the defendant to secure the payment of the sum of $900, with interest at the rate of 7 per cent. per annum from May 26, 1932.

2 Cal.App.2d 724

PEOPLE v. VOILER et al.

Cr. 2546.

District Court of Appeal, Second District,
Division 2, California.

Dec. 10, 1934.

Rehearing Denied Dec. 20, 1934.

Hearing Denied by Supreme Court
Jan. 9, 1935.

1. Robbery ⇨17(5)

Robbery indictment charging defendant with robbing named persons of money and jewelry *held* not defective as not alleging that property was not the property of defendant.

2. Criminal law ⇨531(4), 1170(1)

Refusal to admit evidence offered on voir dire in opposition to alleged confession before ruling on admissibility of alleged confession *held* erroneous but not prejudicial.

3. Witnesses ⇨301

Where defendant testified on direct examination that officers' testimony as to defendant's statements was untrue and, on cross-examination, stated that charge of untruthfulness went through whole case from time of arrest until defendant went before grand jury and thereafter, further question whether defendant told truth now or before grand jury *held* in substance proper cross-examination and not invasion of constitutional protection against self-incrimination.

4. Criminal law ⇨730(3)

In robbery prosecution, where, after court interposed objection to deputy district attorney's question to alleged robbery victim whether he knew that person with whom he had seen defendant was gangster, the question was cited by defendant as misconduct and court promptly admonished jury to disregard the remarks of counsel and the question, alleged misconduct *held* not to require reversal.

5. Criminal law ⇨37 [illegible]22(3)

In robbery prosecution, reference by people's witness to defendant, who was clerk in gambling house, as gunman, racketeer, and gangster, *held* improper and should have been excluded; but, where it was not excluded, deputy district attorney's reference in argument to such characterization of defendant by the witness was not ground for reversal.

6. Criminal law ⇨1186(4)

Where guilt of defendant convicted of second-degree robbery was clearly established by evidence and there was no reason to assume that jury would have reached different result if alleged errors in rulings on evidence and alleged misconduct of counsel had not occurred, conviction *held* to require affirmance (Const. art. 6, § 4½).

◆

Appeal from Superior Court, Los Angeles County; Harry F. Sewell, Judge.

Robbery prosecution on two indictments against Harry O. Voiler, Edward Friedman, and another. Second-named defendant was convicted of robbery in the second degree as to each offense charged, and he appeals.

Affirmed.

William J. Clark and Nathan M. Dicker, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

SCOTT, Justice pro tem.

Two indictments were returned against defendant Friedman charging two separate offenses of robbery, and were consolidated for trial. He was convicted by a jury of robbery in the second degree as to each offense. From judgment of conviction and order denying motion for new trial as to each charge, said defendant appeals.

[1] Each indictment is alleged to be deficient in one respect, although conceded to be sufficient otherwise. Appellant urges that in a charge of robbery it is necessary to include "allegations from which it can be ascertained that the property alleged to have been taken was not the property of this appellant." The indictments were sufficient under the authority of People v. Covington (Cal. Sup.) 34 P.(2d) 1019.

The first indictment charged appellant and two codefendants, Voiler and Cohen, with robbing one Mae West on September 28, 1932, taking from her money and jewelry valued at $15,400. The second indictment charged appellant and Cohen with robbing one A. Brown of $220 on or about September 21, 1931.

[2] The evidence indicates that about 7 o'clock on the evening of the West robbery the complaining witness was seated next to defendant Voiler in the front seat of a parked sedan. A man came up to the car, opened the right-hand door, and said, "This is a stick-up." He pointed something resembling a gun at the occupants and took a purse and jewelry, speaking several sentences to them

during the operation. He wore no mask and had a lighted cigarette in his mouth. The complaining witness observed his eyes, part of his nose, and the center of his face. She also observed his height and size, and that his hand was heavy and rather stout. Pursuant to a telephone call a few days later the purse was recovered but not the money or valuables. A year later, on Thanksgiving night, 1933, appellant was brought out by officers to the spot where the offense was committed and was there recognized by the complaining witness. Appellant explained that Voiler had planned the holdup and that he (appellant) had done it and said he was sorry. While in the custody of the officers, appellant made a confession as to the essential elements of the crime charged. There was a sharp conflict in testimony as to whether Friedman had been subjected to a beating for the purpose of inducing him to make such a statement, but it appears from the record that the court and jury probably concluded that the bruises complained of were received when appellant resisted arrest and not otherwise, and that the confession was voluntarily made and not induced by force or threats. The trial court's error in not admitting evidence offered on voir dire in opposition to the statement before ruling on its admissibility does not appear to have been prejudicial. People v. Eli, 131 Cal. App. 482, 21 P.(2d) 654.

In support of the indictment charging robbery of Brown, the latter testified that he had been held up by two men whom he did not see, and that appellant later accosted him and suggested that they be friends and that he would return to Brown the money he had taken from him. Appellant also admitted to the officers the robbery of Brown, giving the details of this offense.

[3] When called as a witness appellant declared that testimony of certain officers as to his statements was a "lot of lies." On cross-examination he said that the charge of untruthfulness "goes from the top to the bottom of this whole case, that is, from the time I was arrested until I went to the grand jury, and right to the time that I am on the witness stand right now." He was asked, "Are you telling the truth now, or were you telling the truth before the grand jury?" To which he replied, "I am telling the truth now and I was not telling the truth at the grand jury." The last question, although now complained of as an invasion of appellant's constitutional right to not be a witness against himself, was in substance proper cross-examination of him.

On cross-examination of the district attorney, who was called as a witness, counsel for appellant asked certain questions which might have tended to elicit answers showing that the witness had bias against the defendant Voiler. Also, the complaining witness was asked on cross-examination: "Now Miss West, I take it that you yourself did not stage this holdup for publicity purposes, did you?" Objections to these questions and to many others during the trial were sustained. The record indicates that such matters as counsel properly sought to present to the jury for their consideration were fully covered and that the omissions complained of were not material.

Voluminous instructions were offered by appellant at the conclusion of the trial and certain of them were refused by the court. The court fully and clearly instructed the jury on all of the essential legal principles applicable to the case, and there is nothing to indicate that they were confused or misled by the charge.

[4, 5] Alleged acts of misconduct by the deputy district attorney and by the court are urged as grounds for reversal. It appears needless to discuss them in detail. In one instance the witness Brown, who testified on cross-examination that he had seen appellant with one Eddie Rollins, was asked on redirect examination by the prosecutor: "You know, do you not, Mr. Brown, that Eddie Rollins is a gangster?" Defense counsel interposed:

"Just a moment. Well, I will not object.

"The Court: The court will interpose an objection."

Thereupon the asking of the question was cited by appellant as misconduct. The court promptly admonished the jury to disregard the remarks of counsel and questions to which objections were sustained, and told the jurors that he had interposed an objection to the question. The question was never answered. A witness for the people improperly referred to appellant, who was a clerk in a gambling house, as a gunman, racketeer, and gangster, and in his argument the prosecutor referred to this characterization of appellant by the witness. The trial court should have excluded this testimony and in this way averted this error. Under the case of People v. Burke, 18 Cal. App. 72, 122 P. 435, however, it appears to us that the conduct complained of does not constitute grounds for reversal.

[6] An examination of the record convinces us that the errors there observed were in

most instances the inevitable incidents of a protracted trial in which the intemperate language used at times by counsel and witnesses for the people was the result of exasperation induced, perhaps unintentionally, by the other side. The guilt of appellant was clearly established by the evidence, and there is no reason to assume that the jury would have reached any different conclusion under the most tranquil and decorous circumstances. While in no sense condoning or approving irregularities such as the record discloses on the part of appellant as well as the prosecution (People v. Ho Kim You, 24 Cal. App. 451, 141 P. 950), we conclude that under section 4½ of article 6 of the Constitution of California the judgment must be affirmed, since it is clearly apparent that there was no miscarriage of justice.

Judgment and order affirmed.

I concur: STEPHENS, P. J.

I concur in the decision: CRAIL, J.

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2 Cal.App.2d 585

TURNER v. WHITTEL.

Civ. 9213.

District Court of Appeal, First District,
Division 1, California.

Dec. 5, 1934.

Hearing Denied by Supreme Court
Jan. 31, 1935.

1. Assault and battery 🔑35

Evidence supported verdict for plaintiff for injuries claimed to have been inflicted in assault by individuals in employ of defendant who was present and maliciously incited and abetted acts complained of.

2. Trial 🔑139(1), 140(1)

Credibility of witnesses and weight of testimony are for jury, and, although impeaching evidence in nature of contradictions or otherwise has been received, it is right and duty of jury to determine to what extent they believe or disbelieve testimony (Code Civ. Proc. § 1847).

3. Evidence 🔑588

Jury may give credence to witness who has falsely testified in part, or whose testimony contains contradictions or inconsistencies.

4. Appeal and error 🔑1003

Appellate court is not concerned with question of preponderance of evidence but with single inquiry whether record contains substantial evidence supporting findings assailed.

5. Assault and battery 🔑18

Principal actor or actual assailant and all others who aid, abet, counsel, or encourage wrongdoer are equally liable with him to injured party for assault.

6. Appeal and error 🔑1004(3)

That trial court determined damages were excessive and reduced amount awarded does not necessarily indicate that verdict was influenced by prejudice or passion.

7. Assault and battery 🔑40

$5,063, reduced by trial court to $3,000, for injury to arm and back when woman was assaulted and beaten, *held* not excessive, where pleadings and testimony would justify punitive damages.

8. Assault and battery 🔑39

Pleadings and testimony showing plaintiff was assaulted and beaten by individuals in employ of defendant who was present and maliciously incited and abetted acts complained of *held* to authorize award of punitive damages.

9. Damages 🔑151, 220, 221

Punitive damages need not be demanded by name if facts justifying their recovery are pleaded, nor need they be segregated from actual damages allowed, either in findings or verdict, unless such segregation be requested.

◆

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Evelyn Turner against George Whittel. Judgment for plaintiff, and defendant appeals.

Affirmed.

George J. Hatfield, of San Francisco, for appellant.

Twain Michelsen, of San Francisco, for respondent.

PER CURIAM.

An action to recover damages for personal injuries. Plaintiff alleged that she was assaulted and beaten by individuals in the employ of defendant Whittel, who was present and maliciously incited and abetted the acts complained of. A jury returned a verdict in plaintiff's favor for $5,063. Upon a motion for a new trial, the judgment was, with plaintiff's consent, reduced to $3,000, whereupon the motion was denied.

[1] Defendant, who has appealed from the judgment, contends that the evidence was insufficient to support the verdict; that the damages assessed were excessive and appear to have been awarded under the influence of passion and prejudice.

The alleged assault occurred on May 4, 1930, in an apartment in San Francisco. Several persons were present. One witness, Mrs. Jenkins, testified that she was in possession of the apartment, and that the others, including the defendant, were her guests. Among these were a piano player and singer. Plaintiff testified that the defendant told her that the apartment was his, and that Mrs. Jenkins, the singer, and the piano player were in his employ. Plaintiff further testified that she herself was employed by the defendant on May 3, 1930, as a hostess and his companion; further, that he paid her $50 in cash, and later she received a check for the same amount signed by the witness Jenkins, who had been told by defendant in plaintiff's presence to send it. According to the plaintiff, she remained in the apartment for the better part of two days; the defendant and the witness Jenkins being also present. A number of persons came and went during that time, and it appears that the entertainers mentioned remained for the greater portion of the time. It is clear from all the testimony that intoxicating liquors were served freely, and that plaintiff with the others imbibed to some extent. Plaintiff testified that during the evening of May 4, 1930, Mrs. Jenkins assaulted the piano player and the singer with a whip, the defendant being present, following which she struck the plaintiff several blows; that these assaults were incited by the defendant, his statement with respect to the plaintiff being that he wanted her to "show fear." His demeanor at the time, according to the plaintiff, was, as she described it, that of one "in a delirium," who apparently took pleasure in witnessing the occurrence. Plaintiff gained possession of the whip and threw it beyond Mrs. Jenkins' reach, whereupon the defendant ordered the singer to recover it, which he did, and Mrs. Jenkins again struck the plaintiff several blows, and defendant encouraged Mrs. Jenkins to continue the assault. Plaintiff again obtained possession of the whip, and the singer, being ordered to do so by the defendant, forcibly took it from her, and in so doing injured plaintiff's arm and back. A physician who was called shortly thereafter testified that plaintiff sustained a wrenched shoulder and sprained ligaments, and that later black and blue spots developed on her right shoulder and around her right elbow. He also testified that at the time of his first examination plaintiff's breath indicated that she had been drinking. Mrs. Jenkins and a servant girl employed in the apartment denied that there was any assault upon plaintiff, but that, on the contrary, the latter assaulted the piano player, and that any injuries she may have received were caused by his efforts to take the whip from her. According to these witnesses, the defendant took no part whatever in the altercation. Mrs. Jenkins also testified that plaintiff was not employed as a hostess, and that the check mentioned was for money which the witness lent her. Another physician—who was first called, but whose services plaintiff refused—testified that plaintiff was under the influence of liquor. In addition, certain testimony by way of impeachment was offered.

The defendant did not testify at the trial. He insists that plaintiff's testimony is incredible, and that the testimony of his witnesses was of such a character and weight that there was no substantial conflict, and that therefore the verdict must have been the result of passion or prejudice.

[2-4] The questions of the credibility of the witnesses and the weight to be given their testimony are for the jury (Code Civ. Proc. § 1847); and, although impeaching evidence in the nature of contradictions or otherwise has been received, it is still the right as well as the duty of the jury to determine to what extent they believe or disbelieve the testimony. Estate of Gird, 157 Cal. 534, 108 P. 499, 137 Am. St. Rep. 131; Secondo v. Secondo, 218 Cal. 453, 23 P.(2d) 752. They may likewise give credence to a witness who has falsely testified in part (Robinson v. Robinson, 159 Cal. 203, 113 P. 155), or whose testimony contains contradictions or inconsistencies (Bitsekas v. Parechanian, 67 Cal. App. 148, 226 P. 974). An appellate court is not concerned with the question of the preponderance of the evidence but with the single inquiry whether the record contains substantial evidence tending to support the findings assailed. Hotaling v. Hotaling, 187 Cal. 695, 203 P. 745; Johnson v. Risdon, 89 Cal. App. 768, 265 P. 505.

Where, as here, the versions of the affair were in direct conflict, it is impossible for us to determine from the record where the truth lay. The jury heard the witnesses and observed their manner of testifying, and we cannot say that their conclusion that the plaintiff's testimony was true was not, in view of all the circumstances, justified.

Plaintiff testified to her contract with the defendant and his statement to her that the others present were in his employ. If this was untrue, the defendant could have contradicted it; yet he failed to testify. No reason for this appears, and the fact was one for the jury to consider. Bone v. Hayes, 154 Cal. 759, 765, 99 P. 172. Moreover, it is undisputed that plaintiff received injuries at the time and place alleged and in defendant's presence. Whether she was assaulted and, due to his morbid instincts which the evidence suggests or otherwise, the assault was incited by him, were questions for the jury to determine, and we cannot say that their verdict is without substantial support.

[5] It is the rule that not only the principal actor or actual assailant, but all others who aid, abet, counsel, or encourage the wrongdoer, are equally liable with him to the injured party. 5 Cor. Jur. Assault and Battery, § 13, p. 626. As stated, the evidence shows that the defendant did abet and encourage the assault (Loeb v. Kimmerle, 215 Cal. 143, 9 P.(2d) 199; Lydon v. Beach, 89 Cal. App. 69, 264 P. 511), and there was sufficient to justify the inference that he was actuated by malice in so doing (5 Cor. Jur. Assault and Battery, § 9, pp. 621, 622; Bispo v. Surabian, 62 Cal. App. 443, 217 P. 77; Willis v. Perinoni, 97 Cal. App. 764, 276 P. 359).

[6-9] The trial court determined that the damages awarded by the jury were excessive, and the amount was accordingly reduced, but it does not necessarily follow from this that the verdict was influenced by prejudice or passion (7 Bancroft, Code Practice and Remedies, § 6036, p. 7985; Swett v. Gray, 141 Cal. 63, 74 P. 439; Standiford v. Cantrell, 87 Cal. App. 736, 262 P. 800), and we cannot say as a matter of law that such is the case.

According to plaintiff's version of the affair—which the jury believed—she was humiliated and painfully injured. Although the award was excessive as found, and doubtless the jury in making it were in some degree moved by their natural sympathy for one upon whom a deliberate wrong had been inflicted, the circumstances do not compel the conclusion that issues other than damages were thereby affected. Moreover, the allegations of the complaint and the testimony established a case wherein punitive damages might properly have been awarded. Bloomberg v. Laventhal, 179 Cal. 616, 178 P. 496. It was not necessary that such damages be demanded by name if the facts justifying their recovery were pleaded (Waite v. San Fernando Pub. Co., 178 Cal. 303, 173 P. 591), nor need they be segregated from the actual damages allowed either in the findings or verdict unless such segregation be requested (Foley v. Martin, 142 Cal. 256, 71 P. 165, 75 P. 842, 100 Am. St. Rep. 123; Bloomberg v. Laventhal, supra).

The verdict is fairly supported, and the record discloses nothing which would warrant a reversal.

The judgment is affirmed.

CAMERER v. CALIFORNIA SAVINGS & COMMERCIAL BANK OF SAN DIEGO et al.*

Civ. 1105.

District Court of Appeal, Fourth District, California.

Nov. 20, 1934.

Hearing Granted by Supreme Court Jan. 17, 1935.

1. **Principal and agent ⇨166(1)**
Unauthorized act of another cannot be ratified by one who has no knowledge of act.

2. **Banks and banking ⇨63½**
Superintendent of Banks, in taking over an insolvent bank, acts for creditors of the institution and its depositors and can assert defenses which are not available to bank.

3. **Estoppel ⇨72**
One who through misplaced confidence in another puts it in power of the other to injure innocent third parties must bear loss occasioned by wrongful act of party in whom confidence was misplaced.

4. **Banks and banking ⇨76**
Bank's possession of bearer bonds delivered to bank, to be used in such way as to enable bank to make profit, by owner who accepted security for their return and money for their use, was not rendered unlawful, because bank used bonds for purpose not contemplated by owner, as regards owner's right to recover bonds after bank became insolvent.

5. **Banks and banking ⇨76**
Bond owner who "hired" bearer bonds, which he delivered to president of bank, to bank to be used to enable bank to make prof-

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⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 48 P.2d 39.

it, and who accepted security for their return and money for their use, could not recover bonds, which were pledged by president to bank to secure payment of president's note to bank, from insolvent bank to prejudice of innocent creditors, where all of owner's dealings were had with bank and dealings of bank with respect to bonds were in fraud of rights of creditors.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Clyde B. Camerer against the California Savings & Commercial Bank of San Diego and Edward Rainey, as Superintendent of Banks and trustee in charge of the liquidation of the California Savings & Commercial Bank. From the judgment, the defendants appeal.

Reversed.

For prior opinion, see 35 P.(2d) 422.

Gray, Cary, Ames & Driscoll, of San Diego, and Sullivan, Roche, Johnson & Barry, of San Francisco, for appellants.

Stearns, Luce & Forward and Whelan & Whelan, all of San Diego, for respondent.

MARKS, Justice.

A rehearing was granted in this case in order that we might consider cases not before us at the time of our former decision. After careful review of the facts and the law we are constrained to adhere to our earlier conclusions.

Respondent instituted this action against appellants, and others, to recover possession of $45,500 par value of bonds and other securities, or their value, if possession could not be had. Other relief was sought which it is not necessary that we consider here. Judgment was rendered against Edward Rainey as Superintendent of Banks for the recovery of the securities in his possession of the par value of $44,500, or their market value in the sum of $39,385, in case redelivery could not be made. The case against the California Savings & Commercial Bank of San Diego was ordered dismissed. We will hereafter refer to the California Savings & Commercial Bank of San Diego as the bank.

I. I. Irwin was a banker with an experience of more than eighteen years in the city of San Diego. Respondent was a medical officer in the United States Navy, a friend and acquaintance of Irwin's, and a depositor in the financial institutions with which he was connected. Irwin organized the California Savings & Commercial Bank of San Diego and became its president. He owned four thousand one hundred twelve out of a total issue of five thousand shares of its capital stock. He dictated the policies of the bank, except during the last few months of its existence as a going concern. About the time of its organization he persuaded respondent to transfer his account to the bank and to purchase fifty shares of its capital stock.

The California Safe Deposit Company of San Diego conducted a safe deposit business in the basement beneath the bank. While it had a separate corporate entity, it was a subsidiary of the bank and was controlled by it. On November 5, 1927, respondent rented a safe-deposit box in which he kept his valuable papers. According to the signature card and rental agreement, C. B. Camerer, Mrs. C. B. Camerer, his wife, and I. I. Irwin were authorized to open the box. Respondent was frequently away from San Diego for considerable periods of time on duty with ships, at sea, or at hospitals in other localities. During such times Irwin, without the knowledge and consent of respondent, opened the safe-deposit box, clipped and collected the coupons and performed other services for him.

The bank continuously lost money from the time it opened until it was closed. Either quarterly, or semiannually, Irwin placed in the profit and loss account of the bank sufficient money to cover the loss of the period succeeding his prior payment so that no loss would appear on the books.

Irwin began using respondent's bonds in the fall of 1927, and continued using them in 1928 and 1929, whenever the bank needed money to make up its deficit. In all but one of these transactions he described his actions as follows:

"A. Well, as far as my memory serves me, at each quarter the bank needed money to pay the deficit, and when that occurred I took these bonds and sold them to the bank and deposited this money to my account and gave the bank a check to pay on the profit-and-loss account. Later on, when I had money in my account, I took the bonds back, and later on I put them back again. That is my recollection of it.

"Q. Did some of the other officers of the bank know the nature of these transactions? A. I suppose so. * * * Those bonds were turned over to the official who had charge of the bonds, and he made out the statement and credited the amount to my account and charged the bonds to the bank's bond account. That's my recollection.

"Q. During this period that you were speaking of, the bank was not making any profits, but, on the contrary, was losing money? A. Yes.

"Q. And needed the money at the end of each quarter to pay its running expenses? A. Yes.

"Q. And these bonds were simply manipulated in that way so that the bank would have money? A. Yes. * * *

"Q. Into which of the bank's accounts was that put? A. It was charged to my account and credited, as far as I know, to the profit-and-loss account of the bank.

"Q. Was the same thing done in regard to money ostensibly raised by the other negotiations with these bonds that you say were similarly sold to the bank? A. As far as I remember.

"Q. All went into the profit-and-loss account of the bank and it was needed for the running expense of the bank? A. Yes, sir."

Respondent at no time prior to the closing of the bank in July, 1930, had any knowledge that Irwin had sold any of his bonds or securities or used them as a pledge to secure payment of a promissory note to the bank, and prior to November 21, 1929, did not know that Irwin had removed any of the securities from the safe-deposit box.

The "sales" of respondent's securities to the bank were made by Irwin upon his express understanding with the other bank officials that they were to be kept separate from other securities owned by the bank; that the bank would not sell them; that Irwin would repurchase them when he could; that the coupons would be clipped and delivered to Mr. Irwin. Irwin repurchased all of the securities "sold" to the bank prior to September, 1929, and returned them to the Camerer safe-deposit box.

In the latter part of September, 1929, Irwin needed over $20,000 to make good the losses of the bank. He removed securities of the par value of $22,500 from the safe-deposit box of respondent and "sold" them to the bank, at their market value, with the instructions we have outlined. These were never repurchased by Irwin, but, with the exception of one $1,000 bond which matured and was delivered to Irwin, remained in possession of the bank and were taken over by the Superintendent of Banks when he closed it.

In the latter part of November, 1929, respondent made an unexpected and hurried return to San Diego. Irwin contacted him and explained that he wanted to rent the use of some of the securities. He explained to Camerer that the bank had ways of making profits from the securities in addition to their regular interest. Camerer consented and gave Irwin the securities he desired which were the same ones which Irwin had "sold" to the bank in September, 1929. They were all in Camerer's safe-deposit box, though how, when or by whom they were taken from the bank safe and returned to the Camerer safe-deposit box is not explained. Irwin gave Camerer the following receipt and agreement:

"California Savings & Commercial Bank
of San Diego
San Diego, Cal., Nov. 21, 1929
Bonds borrowed
from C. B. Camerer
by I. I. Irwin
As follows:

$9,500.—Bryant Building Inc.	6½%
"3,000.—Midland Counties Land Co.	7 %
"3,000.—Otis Steel Co.	6 %
"5,000.—Pickwick Corporation	7 %
"2,000.—Utilities L & P Corp.	5½%

$22,500.—par value (Twenty Two Thousand Five Hundred Dollars)—

As security for the return of said Bonds I hereby deposit with C. B. Camerer

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Certificate No. /~~200~~ for two hundred (200) shares of the capital stock of the California Savings & Commercial Bank of San Diego to be redelivered to me upon the return by me to C. B. Camerer of the above Bonds.

¼% (one quarter of one per cent.) Premium as hire to be paid by I. I. Irwin to C. B. Camerer or $56/25 (Fifty six 25/100 Dollars)

for each three months or less
November 21, 1929
I. I. Irwin."

On December 31, 1929, the bank again needed funds to make up its deficit. Irwin had one of his employees execute a promissory note to the bank in the sum of $23,000 and pledged $23,000 par value, of respondent's securities for the payment of this note. The money was deposited to the credit of the employee, transferred to Irwin's account, then transferred to the profit and loss account of the bank. These securities are now in the possession of the Superintendent of Banks.

On January 8, 1930, Irwin telephoned the residence of respondent. Respondent was not at home and Irwin explained to Mrs. Camerer that he could use more securities under the same arrangement as before. She communicated with her husband who consented to the transaction. She went to the bank, opened the safe-deposit box, where the exact securities which Irwin desired to use were reposing, delivered them to Irwin and took a receipt in substantially the same form as the one dated November 21, 1929. The securities were the identical ones pledged to the bank to secure the note of December 31, 1929. How they were returned to the safe-deposit box does not appear unless an explanation is offered in the testimony of Irwin that they might have been delivered to the bank after the date of the note.

Some time after the 8th of January, 1930, the bank returned to Irwin $54,000 of the money he had paid to it. Later, on demand of other officers of the bank, Irwin paid the bank over $70,000 of his private funds which were used to adjust irregular transactions not connected with his use of the Camerer securities. Some time before the bank was closed, and after January 8, 1930, officers of the bank, other than Irwin, learned that the securities "sold" to the bank in September and pledged on December 31, 1929, were not the property of Irwin but belonged to Camerer.

Numerous other facts were developed at the trial which form the basis of extended arguments in the briefs. From the view we take of the case it is not necessary to extend this opinion by detailing these facts or considering the questions of law which counsel raise and are based upon them.

The trial court found that the bank was insolvent on July 23, 1930; that it had been taken over by the Superintendent of Banks on that day, together with the Camerer securities of the par value of $44,500; that these securities have remained in the possession of the Superintendent of Banks; that Irwin, in September and December, 1929, had neither right nor authority to sell, transfer, pledge or convey any interest in the securities to the bank and that the purported sale and pledge were made without the knowledge or consent of Camerer; that the money derived from the "sale" and pledge of the securities went into the funds and assets of the bank; that the receipt given by Irwin to Camerer on November 21, 1929, was given after the purported "sale" to the bank of the same securities described in the receipt; that the same was true of the receipt dated January 8, 1930; for the securities pledged to the bank on December 31, 1929; that Camerer had no notice or knowledge of the sale or pledge of his securities until after the bank was closed on July 23, 1930; that all, or most of, the securities so sold or pledged to the bank were purchased by Camerer through the bank, and this fact was known to the assistant cashier of the bank at the time of the purported "sale" and pledge; that the two receipts for the securities dated November 21, 1929, and January 8, 1930, and signed by Irwin individually were executed by him for and on behalf of and for the benefit of the bank; that all the interest coupons were detached from the securities while in the possession of the bank, delivered to Irwin or the agent of Camerer, and deposited in Camerer's personal account in the bank; that all of the "sales" of the Camerer securities to the bank, and their pledge, between the fall of the year 1927 and January 9, 1930, were made by Irwin wrongfully, without any authority and for the purpose of showing fictitious assets of the bank in order to deceive the Superintendent of Banks; that the bank had notice and knowledge through its officers that Irwin did not have title to the securities at the time of their "sales" and pledge; that the bank received the benefit of the unlawful sale and pledge of the securities to it.

All of the foregoing findings are supported by ample evidence or by reasonable inferences to be drawn from it.

The trial court made the following finding: "That in the transactions above referred to the said plaintiff acted in all respects as an ordinary, prudent person would act, having full confidence at all times in the integrity and honesty of the said defendant Irwin as president of the said California Savings & Commercial Bank of San Diego, * * * plaintiff was not negligent in accepting the receipts above referred to or in permitting the said California Savings & Commercial Bank of San Diego to borrow the said bonds and securities as represented by said receipts above referred to, and the said plaintiff was not negligent in any of the acts done or taken by him, and was not negligent in the omission of any acts whatsoever." This finding is seriously assailed by appellants.

[1] It will shorten this opinion to state frankly that if the bank were not an insolvent institution with its assets in the possession of the Superintendent of Banks, but were a going concern, we would unhesitatingly affirm a judgment which would require the return to Camerer of the securities which had been taken from him by the dishonest acts of the president of the bank. We are not impressed with the argument that Irwin was acting in his

private and not his official capacity in obtaining possession of the securities and in "selling" and pledging them to the bank. We are equally unimpressed with the argument that the receipts signed by Irwin on November 21, 1929, and January 8, 1930, gave Irwin authority to sell or pledge the securities. The "sale" occurred in September, 1929, two months before the first receipt was executed, and the pledge on December 31, 1929, a number of days before the second receipt was signed and delivered to Camerer. He had no knowledge of a prior conversion of his securities. That a person cannot ratify the unauthorized act of another, of which he had no knowledge, is too elemental to need support of authority. We are equally unimpressed with the argument that the bank and its officers, other than Irwin, neither had nor should have had notice of the fraudulent character of the several transactions in which Irwin purported to "sell" and pledge the securities. A large part, if not all of the securities, had been purchased for Camerer by the bank. The bank was not to dispose of any of them but was to hold them for repurchase by Irwin. They were not to be placed among the securities owned by the bank, but were kept separate until a bank examiner ordered the practice discontinued a short time before the bank was closed. The coupons were clipped and delivered to Irwin, he giving his check to the bank for their face value. The coupons, or most of them, were deposited to Camerer's personal account. The "sales" were known to be "wash sales." The signer of the note was known to be a "dummy" and at least two officers of the bank objected to making the loan. All the transactions with the securities were made for the purpose of concealing the losses of the bank and deceiving the Superintendent of Banks as to its actual condition. Surely these and other facts which must have been known to the responsible officers of the bank should have caused them to inquire into the good faith of the transactions.

We must inquire into the position of the Superintendent of Banks, representing as he does the innocent depositors and other creditors of the bank, and determine if he can successfully defend this action when the bank could have no adequate defense.

[2] The Superintendent of Banks in taking over an insolvent bank acts for the creditors of the institution and its depositors. Hoff v. First State Bank of Watson, 174 Minn. 36, 218 N. W. 238; In re Farmers' Exchange Bank of Toronto, 55 S. D. 190, 225 N. W. 307; First State Bank of Herrick v. Conant, 117 Neb. 562, 221 N. W. 691; Bush v. Lien, 57 S. D. 501, 234 N. W. 29; Cockrill v. Abeles (C. C. A.) 86 F. 505; Case, as Receiver, v. Terrell, 11 Wall. 199, 20 L. Ed. 134; Kennedy v. Gibson, 8 Wall. 498, 19 L. Ed. 476.

The Superintendent of Banks, in taking over the assets of an insolvent bank, and acting for the creditors and depositors, can assert defenses which are not available to the bank. Wood v. Kennedy, 117 Cal. App. 53, 3 P.(2d) 366; Texas & Pac. Ry. Co. v. Pottorff, 291 U. S. 245, 54 S. Ct. 416, 78 L. Ed. 777; Hamor v. Taylor-Rice Engineering Co. (C. C.) 84 F. 392. See, also, dicta in Bank of Orland v. Harlan, 188 Cal. 413, 206 P. 75; First National Bank v. Reed, 198 Cal. 252, 244 P. 368.

The findings negative negligence on the part of respondent in his dealings with Irwin and the bank. After examining a long line of California cases we have concluded that lack of negligence alone on the part of Camerer is not necessarily all that is required to resolve the equities of the case in his favor and against the Superintendent of Banks when representing creditors and depositors. In Moss v. Bowman, 116 Cal. App. 720, at page 727, 3 P.(2d) 377, 380, it is said: "'In Shirey v. All Night and Day Bank, 166 Cal. 50, 134 P. 1001, the court said: "Where the true owner holds out another, or allows him to appear as the owner of or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power, which through negligence, or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance." See Schultz v. McLean, 93 Cal. 329, 28 P. 1053; Gardiner v. McDonogh, 147 Cal. 313, 81 P. 964; Chucovich v. San Francisco Securities Corp., 60 Cal. App. 700, 214 P. 263.' In the case of Powers v. Pacific Diesel Engine Co., 206 Cal. 334, 274 P. 512, 514, 73 A. L. R. 1398, it was said: '* * * that where the true owner clothes another with the indicia of ownership of property, and therefore the apparent authority to transfer title thereto, and innocent third parties are thereby led into dealing with such apparent owner, the true owner will be estopped to deny that the apparent authority is the real authority. Code Civ. Proc. § 1962, subd. 3. In such cases the equities are found to be in favor of the bona fide purchaser rather than in favor of the owner who has by his own conduct clothed another with the power to commit the fraud.'" See, also, Smeade v. Rosen, 121 Cal. App. 79, 8 P.(2d) 507; Bank of America v. Universal Finance Co., 131 Cal. App. 116, 21 P.(2d) 147; Schumann-Heink & Co. v. U. S. National Bank, 108 Cal. App. 223, 291 P. 684, 686, 292 P. 547; Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, 227 P. 723; Sidney v. Wilson, 67 Cal. App. 282, 227 P. 672; Otis Elevator Co. v. First National Bank, 163 Cal. 31, 124 P. 704, 41 L. R. A. (N. S.) 529; Maynard v. Firemen's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672; Bedell v. Herring, 77 Cal. 572, 20 P. 129, 11 Am. St. Rep. 307; Butters v. Brawley Star, 48 Cal. App. 57, 191 P. 987; Rapp v. Fred W. Hauger Motors Co., 77 Cal. App. 417, 246 P. 1067; Hollywood Holding, etc., Corp. v. Oswald, 119 Cal. App. 21, 5 P.(2d) 963.

[3] When we measure the conduct of Camerer and Irwin by these rules, we are forced to the conclusion that through misplaced confidence in Irwin, Camerer put into his hands the power to commit the fraudulent acts we have detailed. The securities were made payable to bearer. Irwin had free and unlimited access to them. After they were wrongfully removed from the safe-deposit box by Irwin and "sold" and pledged, they again found their way back into the box and the possession of Camerer. He caused them to be delivered to Irwin, or "hired" to the bank as he expressed it, accepted compensation for their hire and security for their return. He was told that the bank expected to make a profit on the transactions. In accepting a compensation for the hire of the securities a reasonable man must have supposed that something would be done with them, other than letting them repose in the vaults of the bank, in order that a profit might be made over the interest they regularly earned. The facts of this case bring it well within the rule that where a person through misplaced confidence in another puts it in the power of the other to injure innocent third parties, he must bear the loss occasioned by the wrongful act of the party in whom he misplaced his confidence.

[4] As far as this case is concerned the misconduct of the bank occurred with the misappropriation of the securities in September and December, 1929. The carelessness of Camerer did not antedate November 21, 1929, as to the first group of securities nor January 8, 1930, as to the second group. On these dates the securities had been returned to his possession. They were in his safe deposit box and their disposition was under his complete control. He received offers to "hire" them to the bank for a consideration. He accepted the offers and voluntarily gave the securities to Irwin to be used by the bank in such a way that it might make a profit out of them. He accepted security for their safe return to him and was paid the hire promised by the bank. He must or should have supposed that the bank expected to use the securities in some manner in trade or commerce in order to make a profit out of them. He was a stockholder in the bank, had confidence in it and its president, intrusted his securities, which were made payable to bearer, to it to be used in some manner so that the bank could profit from their use, accepted money for their use and security for their return. From the times Camerer delivered the possession of the securities to the bank that possession became legal. That they were used by the bank for a purpose not contemplated by Camerer at the times he gave possession does not make the possession unlawful nor the entire transaction void. Wenban Estate, Inc., v. Hewlett, supra. A somewhat similar situation was presented in the case of Schumann-Heink & Co. v. U. S. National Bank, supra, where a corporation entrusted a security to its secretary with the implied power of sale. The secretary pledged the security for the debt of another. In holding that the corporation was bound by the act of its secretary the court said: "It is, of course, the rule with certain exceptions that do not here concern us, that a mere thief can pass no title to that which he has stolen. The same thing is not necessarily true where he who wrongfully undertakes to deal with property has been, by the act or neglect of the true owner, clothed with the indicia of ownership. The law is, generally, that 'where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer.' Civ. Code, § 3543. In National Safe Deposit, Savings & Trust Co. v. Hibbs, 229 U. S. 391, 33 S. Ct. 818, 820, 57 L. Ed. 1241, it was said: 'The qualification of the rule, as not applying when the instrument is stolen, is not based upon the name of the agent's crime, but upon the fact that, in the ordinary and typical case of theft, the owner has not intrusted the agent with the document, and therefore is not considered to have done enough to be estopped as against a purchaser in good faith. He certainly has not done enough if the estoppel is based upon the principle that when one of two innocent persons is to suffer, the sufferer should be the

one whose confidence put into the hands of the wrongdoer the means of doing the wrong. But in a case like the present, the agent has been intrusted with the converted property, and it is totally immaterial whether, by a stretch which extends largely beyond the true field of trespass, his wrong has been brought within the criminal law or not. The ground of the estoppel is present and the estoppel arises. The distinction is not new. On the one side are cases like Knox v. Eden Mussee Americain Co., 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700, where an *agent or servant simply had access* to a document remaining in the possession of the owner; on the other, cases like Pennsylvania R. Co.'s Appeal, 86 Pa. 80, where possession is *intrusted* to the agent for one purpose and he uses it for another. It cannot matter in the latter class that the agent intended the fraud from the outset.' "

We granted a rehearing principally that we might consider the case of Verder v. American Loan Society (Cal. Sup.) 32 P.(2d) 1081, 1086, which had neither been cited nor considered at the time of our earlier decision. We have carefully studied this case and can find nothing in it to cause us to change our conclusions.

In the Verder Case the American Loan Society and the American Mortgage Company of California were separate corporations with interlocking officers and directors. On March 13, 1930, Mrs. Verder became the owner of a promissory note in the sum of $10,000 secured by a deed of trust and executed to a trustee with the mortgage company as beneficiary by A. W. Kundert and assigned to her without recourse. On January 12, 1931, on request of the mortgage company, Mrs. Verder delivered the note and deed of trust to it for collection. On January 15, 1931, the mortgage company delivered the note and deed of trust to the trustee which executed a reconveyance of the property. This was recorded on January 19, 1931. Prior to December 15, 1930, the loan society had paid over $400,000 to the mortgage company for the purchase of mortgages and deeds of trust, none of which had been delivered on that date. On that date Kundert made application to the loan society for a loan of $10,000 to be secured by a deed of trust on the identical property described in the deed of trust owned by Mrs. Verder. The loan was approved and the note and deed of trust were executed by Kundert and recorded on January 14, 1931, two days prior to the execution of the reconveyance, and five days prior to the recordation of the reconveyance under the deed of trust owned by Mrs. Verder. The mortgage company credited itself with $10,000 against the prior advancement of $400,000 by the loan society and credited Mrs. Verder with $10,000 on its books which was never paid her. Kundert defaulted on his note to the loan society and it acquired title to the property through foreclosure sale. Subsequently the mortgage company went into the hands of a federal receiver for the purpose of liquidation and the loan society into the hands of the state building and loan commissioner.

Mrs. Verder knew nothing of these transactions until after both corporations had become insolvent. She instituted her action against both corporations, the receiver, building and loan commissioner, and numerous individual defendants seeking to have the reconveyance cancelled and her deed of trust reinstated as a first lien upon the property. She was successful in the trial court and the state building and loan commissioner alone appealed from the judgment, which was affirmed by the Supreme Court.

It should be observed that the effect of the judgment was to restore the loan society to the same position in regard to its security that it occupied at the time it accepted its deed of trust. At that time that document was a second incumbrance on the property and subject to the lien of the deed of trust securing Mrs. Verder's note, which was subsequently released by the fraudulent acts of the officers of both companies. The judgment should certainly receive support because it restored the parties to the exact position they occupied before the fraud was committed and no one was injured by this action.

In deciding the Verder Case the Supreme Court announced the following rule: " 'It seems to be established by the weight of authority, that while an operating receiver takes the assets of a corporation subject to all equities outstanding against it, a liquidating receiver acts in the dual capacity of representing the corporation, as such, and also its creditors, and that in the latter capacity, he may claim rights and advance defenses, not available to the corporation. The authorities, however, do not extend this claim to include all cases where a loss will be sustained by creditors if a third party's claim is allowed against the insolvent, *but only to include such cases as where the dealings of the insolvent were in fraud of the creditor's rights, or where the dealings in question were had directly between the third party claim-*

ant and the insolvent corporation.'" (Italics ours.)

[5] Under this rule we are required to reverse the judgment in the instant case. Both elements which the Supreme Court regards as necessary for the application of the general rule are present in the case before us. All of the dealings of Camerer were had with the bank. The trial court so held and there is ample evidence to support the finding. All Mrs. Verder's dealings were with the mortgage company, which did not appeal, and none of them were with the loan society, which did appeal. The dealings of the bank with Camerer's securities were in fraud of the rights of the creditors. The trial court held that: "The said defendant California Savings & Commercial Bank of San Diego by and through its duly authorized officers entered into the transactions above referred to for the purpose of deceiving and defrauding the State of California, its depositors and customers * * *." There is ample evidence to support this finding. In the Verder Case there was no showing that the creditors of the loan society were injured by the fraud. As we have observed the judgment gave it the identical security it had when it accepted the Kundert note and deed of trust.

Camerer urges that the creditors of the bank were not injured by the manipulation of his securities because the bank parted with no money at the time it received them, and that the entire transaction consisted of entries in its books. However, by reason of the use of the Camerer securities the bank was able to keep open and transact business a number of months. After January 8, 1930, the bank paid to Irwin $54,000 to recompense him for some of the assets given the bank from the use of the securities of others. This represents a direct financial loss to the depositors and other creditors of the bank.

After careful study we have concluded that the Verder Case not only does not conflict with the conclusions we have here reached, but is authority supporting them. We may conclude with a paraphrased quotation from the case of Powers v. Pacific Diesel Engine Co., supra, as follows: Camerer was imposed upon and defrauded and of course had a cause of action against those who defrauded him. It may be assumed that such a right of action would be of doubtful fruition, but we may not be led to announce unsound principles of law because of the misfortune of respondent and our sympathies for him.

The judgment in so far as it affects appellants, is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

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2 Cal.App.2d 680

SCHUR v. JOHNSON, State Treasurer.

Civ. 5166.

District Court of Appeal, Third District, California.

Dec. 7, 1934.

1. Licenses 🔑34

Complaint to recover sales tax paid on proceeds of "tango game," alleging that players were charged for participation, that winnings were paid in merchandise redeemable in cash immediately upon receipt thereof, and describing machine on which the game was played, *held* not to state cause of action, since allegations made it doubtful whether game was one prohibited by penal statute and description of machine was such as to indicate that game was based not on skill but pure chance (Pen. Code, § 330).

2. Gaming 🔑23

Courts will not enforce transactions involving a prohibited gambling game, such transactions being against public policy and in conflict with the welfare and morals of society.

3. Licenses 🔑34

In action for return of illegally collected sales tax, taxpayer *held* not entitled to recover where complaint alleged that tax collected was on proceeds from gaming machine and it appeared that machine was a gambling device operated in violation of penal statute (Pen. Code, § 330).

4. Action 🔑4

Law will not lend its support to a claim founded upon its violation.

5. Action 🔑4

Court must raise question of illegality of transaction upon which suit is founded on its own motion, even if parties do not do so, when acts upon which plaintiff relies appear to be in violation of law.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by N. H. Schur against Charles G. Johnson, Treasurer of the State of California. Judgment for the defendant, and the plaintiff appeals.

Affirmed.

Erwin P. Werner and Roy W. Colegate, both of Los Angeles, for appellant.

Leslie H. Kranz, Bernard P. Calhoun, Clive W. Johnson, Young, Lillick, Olson, Graham & Kelly, E. Logan Williams, Errol O. Shour, Saul S. Klein, and W. Cloyd Snyder, all of Los Angeles, amici curiæ.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen. (Roger Traynor, of Berkeley, and Frank M. Keesling, of Sacramento, of counsel), for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff, who operates a tango game played for merchandise which is convertible into cash, has appealed from a judgment which was entered against him for failure to amend his complaint for the recovery of sales tax paid to the state of California under protest, after a demurrer to the pleading had been sustained. The appellant claims that the transactions incident to the game do not constitute sales of merchandise rendering him liable for tax under the provisions of the California Retail Sales Tax Act (St. 1933, p. 2599), and that the act is unconstitutional.

The complaint alleges that the plaintiff maintained at Santa Monica a place of amusement during the year 1933, in which he operated a tango game, the receipts from which amounted to $48,805.91, derived from charges made for each player's participation in the game; that those who succeeded in winning at the game were paid in merchandise, consisting of cigars, cigarettes, or tobacco which are redeemable by the operator of the game at the market value thereof; that during the year 1933 99 per cent. "of the persons winning said games and given said merchandise did not consume the same or any part thereof, and did not play said game for the purpose of securing said merchandise for consumption, but on the contrary sold and disposed of the same immediately upon receipt thereof in the same form as received by them." It was alleged the game of tango was played by means of apparatus including glass-faced bins with "numbered slots or compartments in the bottom thereof," and by use of cards and colored balls. From the description of the game the result of a player's participation therein appears to depend on chance and not upon skill. The complaint alleges that upon the demand of the state board of equalization the plaintiff paid to the state of California 2½ per cent. sales tax on the gross income from his tango game in the year of 1933, amounting to the sum of $1,220.15, and prays for judgment in that sum.

To this complaint the state of California filed a demurrer on the grounds, among others, that the complaint fails to state facts sufficient to constitute a cause of action, and that: "It cannot be ascertained from said complaint whether the plaintiff is engaged in conducting or operating a business which is permissible under the laws of the state of California, or whether plaintiff is conducting a gambling enterprise contrary to and prohibited by said laws." This demurrer was sustained and the plaintiff was allowed ten days in which to amend the pleading. Having failed to amend the complaint, on motion of the defendant, judgment was rendered against the plaintiff for failure to amend his complaint within the time allowed therefor, or at all. From this judgment the plaintiff has appealed.

[1] We are of the opinion the demurrer was properly sustained. If the tango game as it is described in the complaint constitutes "a banking or percentage game played with cards, dice or any device, for money, checks, credit or other representative of value," it is prohibited by the terms of section 330 of the Penal Code as a gambling game, and this court will not assume to determine a controversy respecting the proceeds of such a game. If the game of tango, as it is described in the complaint, appears to be a gambling game which is prohibited by law, but the allegations of the complaint leave it uncertain in that regard, then the demurrer for uncertainty on that ground was properly sustained. There is nothing in the complaint which indicates that the game of tango is a game of skill. On the contrary, the allegations of the complaint indicate that it is a game of chance played by means of cards and a device for money and other representatives of value, in violation of section 330 of the Penal Code. It appears that the plaintiff was maintaining a "place of amusement" at Santa Monica, and not a tobacco store. The very fact that the average gross income from this game of tango which is conducted in an acknowledged place of amusement was in excess of $4,000 a month indicates that it was not a mere tobacco stand business that was being maintained. The players pay to the op-

erator of the game money for the privilege of winning a prescribed stake based on pure chance. Ninety-nine per cent. of those who play at the game do so with no intention of accepting the merchandise in payment of their winnings, and on the contrary forthwith accept the market value of the merchandise in paying off their winnings. The offering of cigars, cigarettes, or tobacco as an inducement to participate in this chance game is a mere subterfuge. Apparently the tango game which is described in the complaint is a pure gambling game which is prohibited by the provisions of section 330 of the Penal Code. Since it does appear to be a gambling game, or even though the allegations of the complaint leave a doubt as to whether it is such a prohibited game, the court properly sustained the demurrer on the ground of uncertainty.

[2] It is the uniform rule of our courts that transactions involving a prohibited gambling game will not be enforced for the reason that such transactions are against public policy and in conflict with the welfare and morals of society. 12 R. C. L. p. 747, § 52; 6 R. C. L. p. 712, § 120. In the authority last cited it is said in that regard: "Courts of justice will never recognize or uphold any transaction which, in its object, operation, or tendency, is calculated to be prejudicial to the public welfare. * * * A contract is against public policy if it is injurious to the interests of the public or contravenes some established interest in society, or if it contravenes some public statute, or is against good morals, or tends to interfere with the public welfare or safety."

[3, 4] This suit is one in assumpsit for the return of money paid under protest. This action is based on the theory that the board of equalization illegally enforced the payment of the money under the Sales Tax Act assuming that the plaintiff was conducting a tobacco business which requires him to pay the sales tax on all merchandise sold, and that the law assumes there is an implied promise to return to the owner the money which is so illegally acquired. In support of his theory that he was not conducting a business in which sales of merchandise are made, the plaintiff has pleaded and must rely on the conducting of transactions which appear to be in conflict with section 330 of the Penal Code. Courts will not lend their aid to transactions founded on illegal contracts or acts in violation of law. It is said in 2 Elliott on Contracts, p. 4, § 645, in that regard: "The law will not lend its support to a claim founded upon its violation. * * * No court will lend assistance to one who founds his cause of action upon an illegal act * * * when it appears that the very party who is seeking aid from the court participated in the unlawful purpose. It has been said that the test of its application is whether the plaintiff can establish his case otherwise than through the medium of an illegal transaction to which he himself is a party."

[5] In the present case the demurrer raises the question of the illegality of the tango game incident to which the sales tax was collected. Even if the parties to the suit do not raise the question of the illegality of the transaction upon which the suit is founded, it is the duty of the court to do so on its own motion, when the acts upon which the plaintiff relies appear to be in violation of law.

We are of the opinion the demurrer was properly sustained.

The judgment is therefore affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

BRANT v. CALIFORNIA DAIRIES, Inc., et al. *

Civ. 8796.

District Court of Appeal, Second District, Division 2, California.

Dec. 6, 1934.

Rehearing Denied Jan. 4, 1935.

Hearing Granted by Supreme Court Feb. 4, 1935.

1. Contracts 🔑176(1)

Construction of contract is always matter of law for court, no matter how ambiguous, uncertain, or difficult its terms are.

2. Appeal and error 🔑1011(1)

Trial court's determination of disputed facts and circumstances to be considered in interpretation of contract on conflicting evidence will not be disturbed on appeal.

3. Appeal and error 🔑1008(3)

Appellate court cannot set aside trial court's judgment, giving ambiguous contract a tenable construction consistent with parties' true intent and meaning, and substitute appellate court's interpretation thereof, sim-

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*For subsequent opinion see 48 P.2d 13.

ply because another interpretation than that of trial court is also possible.

4. Appeal and error ⇐1008(3)

Appellate court will not substitute its views as to construction of ambiguous contract for those of trial court, where latter found that each party to contract adopted different possible construction thereof.

5. Contracts ⇐15

There was no contract between dairyman and milk distributor differing as to whether contractual requirement of year's notice before distributor ceased distributing agreed quantity of milk at agreed price depended on mutual adjustment of quantity and price to meet market conditions (Civ. Code, § 1580).

6. Contracts ⇐15

Consent to same subject-matter in same sense by parties to contract is essential to validity thereof (Civ. Code, § 1580).

7. Contracts ⇐15

There can be no contract, unless parties' minds have met and mutually agreed (Civ. Code, § 1580).

◆

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by D. O. Brant against the California Dairies, Incorporated, the name of which was changed to Western Dairy Products, Incorporated. Judgment for defendant, and plaintiff appeals.

Affirmed.

Chapman & Chapman and Ward Chapman, all of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles, for respondents.

SCOTT, Justice pro tem.

Plaintiff, a dairyman, sued to recover damages for alleged breach of contract by defendant as milk distributor. The two corporate names set out in the complaint refer to but one defendant; the name California Dairies, Inc., having been changed to Western Dairy Products, Inc.

Defendant's predecessor had marketed plaintiff's product on a schedule of prices agreed upon and subject to change by mutual agreement, the distributor receiving a commission on the retail bottled and wholesale milk thus sold. In February of 1929, after defendant had taken over the milk distributing business, plaintiff became dissatisfied with this agreement and indicated his intention of reducing his herd unless a more satisfactory marketing agreement could be consummated. Certain letters were exchanged between plaintiff and one Carver, an official of defendant corporation, which plaintiff contends constituted a contract between the parties and pursuant to which defendant undertook to market an amount of milk which was to be increased each month until a certain maximum had been attained. Upon failure to distribute the amount set out in the letters or to reach an agreement with reference to future sales, the relations between the parties terminated and plaintiff sued for damages. Upon judgment for defendant he appeals.

Plaintiff contended that certain correspondence should be construed as constituting a contract to the effect that defendant would market milk produced by him on a commission basis in a volume starting at 950 quarts per day in January and increasing to a maximum of 1,500 quarts per day at the monthly rate of increase of 50 additional quarts per day, at a price fixed at that time, advertising costs being shared by the parties, and providing that defendant could withdraw from the agreement to sell such quantities of milk at the fixed price only upon one year's notice. The trial court found in effect that plaintiff in good faith placed this construction on the correspondence and that plaintiff believed that the official Carver, of defendant corporation with whom plaintiff was dealing, placed the same construction on it. The court found that Carver in good faith placed a different construction on the correspondence and believed that plaintiff shared with him the view he entertained as to its effect. This latter construction included terms which permitted defendant, if the distribution were unsuccessful as to quantity or price, to negotiate with plaintiff for such a reduction of price or other modification of terms as appeared requisite to a successful marketing arrangement, and if no such modification could be agreed upon they would be mutually released, and that the agreement to give a year's notice was subordinate to the above agreement as to modification of terms.

The court found "that the minds of said plaintiff and said Carver never met, and that they did not understand their correspondence in the same sense or, as hereinbefore found, give to it the same interpretation or construction." It further found that the letters in dispute were ambiguous and "that the fairest and most logical and reasonable interpretation of said correspondence as a whole" and of the said letter was that contended for by defendant, and that the construction urged by plaintiff was "an extremely unfair, unjust and unreasonable construction." Certain other findings uphold the good faith and diligence of defendant in its relations with plaintiff.

[1-4] While the construction of a contract is always a matter of law for the court, no matter how ambiguous or uncertain or difficult its terms (O'Connor v. West Sacramento Co., 189 Cal. 7, 207 P. 527), if the facts and circumstances to be considered in the interpretation of the contract are in dispute, their determination by the trial court on conflicting evidence will not be disturbed on appeal. That is, where the contract is ambiguous, so that there might be two possible and reasonable constructions, "if the construction given by the trial court is one which is tenable, and one which appears to us consistent with the true intent and meaning of the parties, it would not lie within the province of an appellate court to set aside the judgment of the trial court and substitute its own interpretation, simply because another interpretation thereof is also possible." Manley v. Pacific Mill & Timber Co., 79 Cal. App. 641, 648, 250 P. 710, 713. Similarly, where it appears, as in this case, that there are two possible constructions and that the trial court has found that one construction was adopted by one party and the other different construction was adopted by the other, this court on appeal will not undertake to substitute its views for those of the trial court.

[5-7] The difference in understanding centered around plaintiff's contention that he had a right to a year's notice if defendant was to cease distributing the quantity fixed, at the price under which they were then working, and defendant's contention that such requirement for notice was agreeable only if they mutually adjusted the quantity and price to meet market conditions. The oral testimony properly admitted, together with correspondence of the parties, was such as to justify if not require the determination made by the trial court that there was no meeting of minds of the parties and there could be, therefore, no contract. Civ. Code, § 1580. "It is essential to the validity of a contract that the parties should have consented to the same subject-matter in the same sense." Harvey v. Duffey, 99 Cal. 401, 33 P. 897, 899. "There can be no contract unless the minds of the parties have met and mutually agreed." German Savings & Loan Soc. v. McLellan, 154 Cal. 710, 99 P. 194, 196.

By reason of the above views it appears unnecessary to consider the other points raised.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

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3 Cal.App.2d 97

PEOPLE v. McMANNERS et al.

Cr. 308.

District Court of Appeal, Fourth District, California.

Dec. 14, 1934.

Criminal law 🔑1071

Where appellant's written request for reporter's transcript contained no statement of grounds of appeal or points relied on and no statement thereof was in record, appeal must be dismissed (Rules for Supreme Court and District Courts of Appeal, rule 2, § 7).

◆

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

James McManners and James Kelsey were convicted of burglary, and defendant first named appeals. On motion to dismiss the appeal.

Motion granted, and appeal dismissed.

C. N. Mozley, of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendants were convicted of the crime of burglary and from the judgment entered the appellant filed notice of appeal. On the same day he filed a written request for a transcript. Shortly after the transcripts were filed in this court the respondent filed a notice of motion to dismiss the appeal, noticing the same for December 11, 1934. Notice of this motion was served on the attorney for the appellant on November 23, 1934. No appearance in this court has been made for the appellant and the motion to dismiss was not opposed.

The notice, as made, is based upon the ground that the application for the reporter's transcript contains no statement of the various grounds of the appeal or the points upon which the appellant relies, as required by section 7 of rule 2 of the rules governing this court. It appears that the request for a transcript which was filed contains no statement of these matters and no statement of that kind is to be found anywhere in the record. Under the rule referred to, the appeal must be dismissed. People v. Davis, 103 Cal. App. 318, 284 P. 516; People v. Vincent, 116 Cal. App. 211, 2 P.(2d) 460.

The motion is granted, and the appeal is dismissed.

We concur: MARKS, J.; JENNINGS, J.

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2 Cal.App.2d 655

MOYER v. DRESCH et al.

Civ. 1511.

District Court of Appeal, Fourth District, California.

Dec. 6, 1934.

1. **Appeal and error ⇨979(1)**
   New trial ⇨70
   Motion for new trial on ground of insufficiency of evidence to sustain verdict is addressed to sound legal discretion of trial court, and its order will not be disturbed, except in clear case of abuse of discretion.

2. **New trial ⇨70**
   In action by passenger of automobile against driver and owners, granting new trial for insufficiency of proof of willful misconduct of defendants necessary to support verdict for plaintiff *held* not abuse of discretion (St. 1931, p. 1693, § 141¾).

◆

Appeal from Superior Court, Orange County; Edward Henderson, Judge.

Action by Edward Moyer against Florence Dresch and another. From an adverse order, the plaintiff appeals.

Affirmed.

David W. Johnson, of Los Angeles, and Elmer R. Guy, of Santa Ana, for appellant.

Forgy, Reinhaus & Forgy, of Santa Ana, and Walter F. Keen, of Los Angeles, for respondents.

MARKS, Justice.

This is an appeal from an order granting a new trial where the case was tried before a jury as a matter of right. The order specified that the motion was "granted upon the ground of the insufficiency of the evidence to support the verdict."

Defendants are husband and wife. Plaintiff is the brother of Florence Dresch and brother-in-law of Theodore Dresch. On June 19, 1932, the three were traveling from Los Angeles to Lake Elsinore in an automobile owned by defendants and driven by Mrs. Dresch. Mr. Dresch sat on the front seat of the car at the driver's right, and plaintiff occupied the rear seat alone.

Mrs. Dresch had driven a car but two or three times before. Her route took her through the Santa Ana Canyon, where the roadway has deviations both as to direction and elevation. In rounding curves, Mrs. Dresch frequently permitted the car to swing to the center, or beyond the center, of the road, and did not hold it on a true course. On one occasion before the accident when the automobile swung to or over the center of the highway, Mr. Dresch took hold of the steering wheel and brought it back to its own side of the road. At the time of the accident, Mr. Dresch put his hands on the steering wheel and the car turned over, causing the injuries to plaintiff which form the subject-matter of this action. Plaintiff testified that before the accident he had protested at the manner in which his sister was driving, and asked her to stop so that he could get out. He knew before starting the journey that she was an inexperienced driver.

It is admitted that plaintiff was a passenger and could only recover upon proof of willful misconduct on the part of one or both of the defendants. California Vehicle Act, § 141¾ (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693). Willful misconduct as used in the California Vehicle Act has been so frequently defined that no good purpose could be served by repeating the definition here. See Howard v. Howard, 132 Cal. App. 124, 22 P.(2d) 279; Walker v. Bacon, 132 Cal. App. 625, 23 P.(2d) 520; Turner v. Standard Oil Co., 134 Cal. App. 622, 25 P.(2d) 988; Olson v. Gay, 135 Cal. App. 726, 27 P.(2d) 922; Forsman v. Colton, 136 Cal. App. 97, 28 P.(2d) 429; Gibson v. Easley, 138 Cal. App. 303, 32 P.(2d) 983; Manica v. Smith, 138 Cal. App. 695, 33 P.(2d) 418; Horning v. Gerlach (Cal. App.) 34 P.(2d) 504; Browne v. Fernandez (Cal. App.) 36 P.(2d) 122.

Theodore Dresch testified that on the second occasion when he put his hands on the steering wheel the car had gone over to the side of the road and seemed to have struck a soft spot; that he took hold of the wheel to prevent the accident. Mrs. Dresch testified that the car turned over on its side at about the moment her husband touched the wheel.

[1, 2] The rules governing a trial judge in passing on a motion for new trial upon the ground of insufficiency of the evidence are set forth in 20 California Jurisprudence, 111, as follows: "A motion for new trial on the ground of the insufficiency of the evidence to justify the verdict or other decision is addressed to the sound legal discretion of the trial court, which has power to set aside a verdict or decision and to grant a new trial, in whole or in part, in every case where, in its judgment, the evidence is insufficient. Accordingly, it is settled that an order granting or refusing a new trial on the ground of insufficiency of the evidence or where this is one of the grounds set up is conclusive upon the appellate court and may not be disturbed on appeal, unless it appears that there was a manifest abuse of such discretion. Indeed, the action of the trial court in granting a new trial upon the ground of insufficiency of evidence is so far a matter within its discretion that if there is any appreciable conflict in the evidence its ruling is not open to review. Thus it seems that where there is some evidence in favor of the applicant, and especially where he also presents affidavits of newly discovered evidence, the court may grant a new trial, although the only conflict in the evidence consists of doubtful inferences of ultimate facts to be deduced from uncontradicted probative facts, since it is exclusively within the province of the trial court to make all inferences and deductions of fact, where the facts necessary to support the judgment do not naturally follow as a necessary sequence from the probative facts."

In Cookson v. Fitch, 116 Cal. App. 544, 3 P.(2d) 27, 29, it is said: "A motion for new trial upon the grounds of insufficiency of the evidence to sustain the verdict and judgment is addressed to the sound discretion of the trial court. Its order will not be disturbed on appeal except in a clear case of the abuse of such discretion. As was said in the case of Smith v. Royer, 181 Cal. 165, 183 P. 660, 663: 'In a jury trial a party is entitled to two decisions on the evidence—one by the jury and one by the trial court, and the trial court is not bound by a conflict in the evidence. Dickey v. Davis, 39 Cal. 565; Curtiss v. Starr, 85 Cal. 376, 24 P. 808; Bates v. Howard, 105 Cal. 173, 38 P. 715; Condee v. Gyger, 126 Cal. 546, 59 P. 26; Green v. Soule, 145 Cal. 96, 78 P. 337.'"

Our examination of the record has brought us to the conclusion that there was no abuse of judicial discretion in the granting of the order for new trial in the instant case.

The order appealed from is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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2 Cal.App.2d 641

CITY OF LONG BEACH v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 9746.

District Court of Appeal, Second District, Division 2, California.

Dec. 6, 1934.

Master and servant 🔑364

Where person applying to county for relief had no money and needed food, though unable to qualify under Pauper's Act, his employment on work furnished through stabilization bureau and payment from funds received from federal appropriation did not establish existence of "contract of hire," so as to vest Industrial Accident Commission with jurisdiction of his claim for compensation (Gen. Laws 1931, Act 5814).

[Ed. Note.—For other definitions of "Contract of Hiring," see Words & Phrases.]

Proceeding for compensation under the Workmen's Compensation Act by Thomas E. Evans, opposed by the City of Long Beach, a municipal corporation, employer. To review an award of compensation by the Industrial Accident Commission, the employer petitions for a writ of the review.

Award annulled.

Nowland M. Reid and Edmund J. Callaway, both of Long Beach, for petitioner.

Everett A. Corten, of San Francisco, for respondent commission.

STEPHENS, Presiding Justice.

An award for injury received in performance of duties assigned while the applicant was a public beneficiary from relief funds is contended to have insufficient support in the evidence.

Many unemployed, including the applicant, having registered with the county of Los Angeles for relief, were issued "work orders" which permitted them to do ordinary work of laborers in the city of Long Beach for small compensation per day. At the expiration of the applicant's order he was directed to join a large corps of men in emergency work of clearing away débris preparatory to reconstruction following a temblor, without the formality of renewing such order. The assistant chief of employment relief of the bureau of county welfare testified that the work and aid were distributed through a stabilization bureau instead of the welfare department, and paid with funds received from federal appropriation known as the R. F. C. It is conceded that the injury occurred during the second period of such relief. Said witness swore that the applicant herein was unable to qualify under the Pauper's Act (Stats. 1901, p. 636, as amended; Deering's Gen. Laws, vol. 2, p. 3130, Act 5814), but had no money and needed food; that stabilization projects were organized to put the men to work, but were discontinued because the welfare bureau was the only legal agency through which R. F. C. funds could be disbursed.

From the fact that work was furnished through a stabilization bureau rather than the usual means, it is argued that Evans was hired by the city of Long Beach, and that the respondent commission was vested with jurisdiction of the claim. A distinction other than in name and origin of funds is not easily discernible. Speaking of such relief under the statute mentioned it was recently said: "The transaction thus far is in the field of public welfare, and the essential characteristics of a contract of hire are not present. Does the fact that a person while receiving such aid is sent out under work orders at a definite sum per hour or day thereunder supply such essentials? We are persuaded that it does not, on the record here presented." And further: "If a contract for hire existed the petitioner would be entitled to enforce payment from the funds of the county of the reasonable value of the services rendered. His status as here disclosed would not lend support to such a cause of action; and we conclude that a contract of hire did not exist between the county and the petitioner at the time in question." McBurney v. Ind. Acc. Commission, 220 Cal. 124, 30 P.(2d) 414, 416.

The law as pronounced in the cited case requires that the award be annulled, and it is so ordered.

We concur: CRAIL, J.; SCOTT, Justice pro tem.

HAAG v. HARRIS et al. *

Civ. 9240.

District Court of Appeal, First District, Division 2, California.
Dec. 10, 1934.

Hearing Granted by Supreme Court
Feb. 7, 1935.

1. Carriers 🔑316(7)

Res ipsa loquitur doctrine *held* inapplicable to injury from fall in elevator shaft in apartment building after injured person had opened elevator door.

2. Carriers 🔑316(7)

Owners of apartment house *held* not liable to one falling into elevator shaft after opening elevator door, even if res ipsa loquitur doctrine were applicable, where inspection before and after accident failed to show defect in self-locking device of elevator door.

3. Negligence 🔑121(2)

"Res ipsa loquitur" doctrine does no more than raise inference of negligence which may be completely overcome as matter of law by evidence, uncontradicted and unimpeached, showing defendant used degree of care required under circumstances.

[Ed. Note.—For other definitions of "Res Ipsa Loquitur," see Words & Phrases.]

◆

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Titus Haag against Max Harris and others. From an adverse judgment plaintiff appeals.

Affirmed.

Ford & Johnson, of San Francisco, for appellant.

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*For subsequent opinion see 48 P.2d 1.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for respondents.

DOOLING, Justice pro tem.

This is an appeal from a judgment for defendants entered pursuant to the verdict of a jury. Plaintiff and appellant sued the owners of an apartment house to recover damages suffered in a fall into the elevator shaft in the apartment building. Appellant testified that he entered the apartment house, walked to the elevator door on the ground floor, opened the door, and fell into the shaft. The elevator was of the automatic, self-operating type, and the door was equipped with a locking device designed to make it impossible to move the elevator from the floor unless the door was closed, and impossible to open the door unless the elevator was at the floor from which the door led. There was no evidence that the self-locking device was defective in any respect.

Numerous witnesses testified that from a time very shortly after appellant's fall into the shaft efforts were made to open the door while the elevator was on another floor, and that the door could not be opened; several of these attempts being made while appellant was still at the bottom of the shaft in an effort to reach him. An inspector of the elevator company which serviced the elevator testified that he had tested the self-locking device two days before the accident and found it in good order. The same inspector and others connected with the elevator company tested the device the same night that the accident occurred with the same result. The following day an inspector and the safety engineer of the Industrial Accident Commission subjected the lock to an inspection, and both testified that they found it working properly and could discover no defect in it. The lock was of a type approved by the Industrial Accident Commission.

[1] From the above recital, which fairly summarizes the evidence, it is clear that no evidence was introduced which would support a finding of defendants' negligence unless the doctrine of res ipsa loquitur applies. Appellant submitted instructions based on the res ipsa loquitur doctrine which the trial court refused to give, and this refusal is assigned as error.

In our judgment, the court's refusal to give such instructions was compelled by the holding of the Supreme Court in Barbieri v. Law, 209 Cal. 429, 287 P. 464, 465. In that case plaintiff was injured by being crushed between a sidewalk elevator and the iron doors which opened onto the sidewalk. The elevator was required by the Industrial Accident Commission to be equipped with an automatic braking device which would render it impossible to raise the elevator while the sidewalk doors were locked. There was evidence in that case that this braking device was either not on the elevator or not in good working order. The court said "that this is not a case where the facts warrant application of the doctrine of res ipsa loquitur, for the instrumentality which caused the injury was at the time within respondent's power to operate. See 19 Cal. Jur. p. 708, § 125 et seq., and many cases cited in note."

After so holding in the Barbieri Case, the Supreme Court further held that the affirmative evidence that the braking device was either removed or not in working order was sufficient to support a finding of negligence.

In the case before us, we have no such affirmative evidence of negligence. On the contrary, all the evidence is to the effect that the locking device on the elevator door was mechanically perfect and in good working order. The case is the same as the Barbieri Case would have been if, instead of showing the braking device absent or defective, the proof had shown such device present and in good working order. In the one case as in the other, the plaintiff himself was at the time manipulating the instrumentality which effected his injury. If the doctrine of res ipsa loquitur is inapplicable in the one case, it must be inapplicable in the other.

[2, 3] However, even if it should be held that the doctrine of res ipsa loquitur is applicable in this case, the proof of the accident simply made a prima facie case which was completely met and rebutted by the other evidence. Both immediately before and immediately after the accident inspection failed to show any defect in the lock, and immediately after the accident it proved impossible to open the door with the elevator absent from the floor. The doctrine of res ipsa loquitur does no more than to raise an inference of negligence which may be completely overcome as a matter of law by evidence, uncontradicted and unimpeached, showing that defendant has used the degree of care required of him under the circumstances. Stott v. Southern Sierras Power Co., 47 Cal. App. 242, 190 P. 478; Memphis St. R. Co. v. Stockton, 143 Tenn. 201, 226 S. W. 187, 22 A. L. R. 1467, and cases cited in the note commencing at page 1471; 45 C. J. 1424, and cases cited in notes 69 and 70; L. R. A. 1917E, 50, and cases cited in note 1.

We conclude that on the entire evidence defendants were entitled to a judgment as a matter of law. This conclusion renders the discussion of other points unnecessary.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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2 Cal.App.2d 579

ÆTNA LIFE INS. CO. v. WOOD et al.

Civ. 1500.

District Court of Appeal, Fourth District, California.

Dec. 4, 1934.

1. Insurance 🔑**587**

Evidence that divorced wife agreed to surrender all right and interest in life policy in return for payment by insured of agreed sum sustained finding that all wife's interest had been transferred, precluding right to policy benefits as against insured's second wife.

2. Insurance 🔑**587**

Change of beneficiaries from divorced wife to second wife *held* effected so as to entitle second wife to proceeds of life policy where, although there was violation of provision that change could be made by insured alone if policy had not been assigned, insurer had waived such provision by agreeing to change if original beneficiary's consent were obtained, and had paid proceeds of policy into court, and insured had done all that could reasonably be expected of him by requesting change.

◆

Appeal from Superior Court, San Bernardino County; Frank A. Leonard, Judge.

Action in interpleader by the Ætna Life Insurance Company against Ora E. Wood and Enid R. Quinn in which defendants filed cross-complaints. From judgment for the last-named defendant, the first-named defendant appeals.

Affirmed.

D. T. Gardner and James H. Boyer, both of Oakland, for appellant.

P. N. McCloskey, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

This is an action in interpleader begun by the plaintiff to determine who is entitled to the proceeds of a life insurance policy issued by the plaintiff upon the life of James R. L. Quinn, now deceased. The decedent and the appellant were married in 1912. The policy in question, dated July 2, 1914, named the appellant as sole beneficiary and contained a provision to the effect that the beneficiary could be changed at any time upon a request signed by the insured alone, provided the policy had not then been assigned by him. Quinn obtained a divorce from the appellant, the final decree being entered on January 2, 1925. In that proceeding the court found that "there is no community property and no children." On January 5, 1925, Quinn married the respondent, who remained his wife until his death on December 19, 1929. The deceased was in ill health for some time before his death, and, although no premiums were paid from and after the year 1927, the insurance policy remained in force under an extension provision contained therein.

The plaintiff paid the sum of $2,155 into court to abide the result of the action. This was the amount of the policy, $2,500, less the principal and interest of a loan for $300 upon the policy made by the plaintiff to the deceased. By appropriate pleadings the appellant and the respondent each claimed the amount deposited in court. Among other things, the respondent alleged that during the pendency of the divorce proceedings between the deceased and the appellant, the parties thereto had entered into an oral agreement of property settlement wherein and whereby, it was agreed that the deceased should obtain from the plaintiff insurance company a loan on the policy here in question, together with a loan on another policy previously issued by the plaintiff to the deceased, and should pay the amount thus borrowed to the appellant, who agreed to transfer, waive, and release all of her right, title, and interest in both of these insurance policies; that thereafter the deceased borrowed on these two policies and paid the whole proceeds of said loans to the appellant; and that immediately after this subsequent marriage, Quinn assigned, transferred, conveyed, and delivered the policy here in question to the respondent and she has ever since been and now is in possession thereof, the lawful holder and owner of the same, and entitled to the proceeds thereof. The court found in all respects in favor of the respondent, and from the judgment entered this appeal is taken.

It is appellant's contention that she is the sole beneficiary named in the policy; that no formal or other change of beneficiary has taken place; and that the findings to the contrary are not supported by the evidence.

[1] First considering the evidence in support of the findings to the effect that the appellant had transferred, waived, and released to the deceased all of her right, title, and interest in the policy in question. The attorney who represented the deceased in his divorce proceeding against the appellant testified that while that proceeding was pending, he was asked to be a witness to a conversation between the deceased and the appellant; that the conversation concerned a property settlement between the two; that he understood from the conversation that the deceased owed the appellant some money and that the deceased stated that he was borrowing some money on two policies in the Ætna Life Insurance Company to settle with the appellant; that according to his memory the sum to be thus borrowed and paid to the appellant was some $600; that the appellant stated that she wanted her money and did not care anything about the policy; that both he and the deceased told the appellant that she was relinquishing all of her right or interest in or to any of the policies; and that she replied that it was all right if she got her money. It also appears from the evidence that the deceased, while the divorce action was pending, borrowed about $600 from the plaintiff insurance company upon these two policies; that the appellant permitted a default decree of divorce to be entered against her; and that the court found in that proceeding that there was no community property of the parties. While the appellant testified that she had never received the money borrowed on the policies, she also denied that she was present at the meeting described by the attorney and denied that any such conversation as that testified to by him had taken place. While a conflict in the evidence appears, the court was at liberty to disbelieve the appellant on the matter of the meeting and conversation and, disbelieving her in this, to refuse to accept her testimony that she had not received the money. We think the evidence, with the reasonable inferences therefrom, is sufficient to sustain the court's findings with reference to a transfer and waiver of her interest in the policy by the appellant, in favor of the deceased.

With respect to the transfer of the deceased's interest in the policy to the respondent and the attempt to have her substituted as sole beneficiary therein, the uncontradicted evidence is that immediately after their marriage the deceased handed the two policies to the respondent and told her they were her property and were to be kept by her in a safe place. Shortly thereafter she allowed her husband to send the policies to the company for the purpose of having the change of beneficiary noted thereon. She typed a letter to the plaintiff insurance company, which was dictated by her husband, in which, after stating that he had been divorced from the appellant, that he had married the respondent, and that the insurance policies had become his sole property under a property settlement made out of court, he requested that the respondent be substituted as beneficiary in the policies. The plaintiff substituted the respondent as beneficiary in the other policy, which is not involved here, but wrote a letter to the deceased stating that under the terms of the policy here in question the beneficiary could be changed only if the policy had not then been assigned and that, since the policy had been assigned to the company as security for a loan, it would be necessary to secure the consent of the former beneficiary or pay up the loan before the beneficiary could be changed. The deceased made an effort to pay off the loan but was unable to do so. The insurance company returned the policy to the deceased and he handed it to the respondent and told her to keep it, also telling her that he believed the company would pay her in the event of his death, since they had changed the beneficiary in the other policy and had his letter requesting a change in this one.

[2] The policy here in question provided that the beneficiary might be changed at any time on the return of the policy with a request for such a change signed by the insured only, provided that the policy had not been assigned by the insured. While the policy had been assigned to the insurance company as security for a loan, the insurance company offered to make the requested change in beneficiaries if the consent of the original beneficiary was secured. This was obviously impossible under the circumstances and, in effect, the insurance company waived the provision concerning the assignment by demanding something not required by the policy. In any event, the insurance company has waived any interest in the matter by tendering the amount due under the policy into court. The deceased did all that he could reasonably be

expected to do in attempting to change the beneficiary and, we think, the circumstances show such an equitable change in beneficiary, under the authorities, as supports the court's findings. Jory v. Supreme Council, 105 Cal. 20, 38 P. 524, 26 L. R. A. 733, 45 Am. St. Rep. 17; New York Life Ins. Co. v. Rose, 70 Cal. App. 175, 233 P. 343; Johnston v. Kearns, 107 Cal. App. 557, 290 P. 640.

In White v. White (Sup.) 194 N. Y. S. 114, 117, the court said:

"Many cases bearing on the question here involved are cited, and from an examination of them it will appear that, while a change of beneficiaries must be made under certain formalities for the protection of the insurer, yet, in cases where the company has waived defending by interpleading, and has paid the money into court, and has no further interest in the litigation between the parties, a far more liberal rule obtains, and that courts of equity seek to do that which the insured apparently intended to have done, and to award the fund to that claimant who had the strongest claim therefor under the existing conditions."

While it is argued that the appellant had a beneficial interest in this policy because of money loaned by her to her husband, this contention is neither proper under the pleadings nor supported by the evidence. The appellant testified that she loaned her husband certain money and that he took out another policy which is not here involved to reimburse her for the money loaned.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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2 Cal.App.2d 450

MARTIN v. ROSEN.

Civ. 9974.

District Court of Appeal, Second District, Division 2, California.

Nov. 27, 1934.

1. Appeal and error 🔑456, 477

Under constitutional provision authorizing District Courts of Appeal to issue writs of mandamus, certiorari, prohibition, habeas corpus, and all other writs necessary or proper to complete exercise of their appellate jurisdiction, writs of supersedeas, probable cause, and injunction are included in "other writs" (Const. art. 6, § 4b, adopted Nov. 1928).

[Ed. Note.—For other definitions of "Writ," see Words & Phrases.]

2. Appeal and error 🔑458(1)

Writs of "supersedeas" and "probable cause" are auxiliary processes designed to supersede enforcement of judgment of trial court brought up for review.

[Ed. Note.—For other definitions of "Supersedeas" and "Writ of Probable Cause," see Words & Phrases.]

3. Appeal and error 🔑477

Appellate courts have inherent and constitutional power to stay proceedings on judgment or order appealed from to preserve status quo of case pending appeal (Const. art. 6, § 4b, adopted Nov. 1928).

4. Appeal and error 🔑456

Appellate court can issue writ of injunction restraining respondent from doing acts during pendency of appeal extrinsic to execution of judgment appealed from which will destroy status quo of subject-matter being litigated (Const. art. 6, § 4b, adopted Nov. 1928).

5. Appeal and error 🔑456

District Court of Appeal could issue writ of injunction to restrain respondent in case appealed from superior court from further proceedings in another case in municipal court between same parties involving same subject-matter and same issues of fact, but in which municipal court did not have jurisdiction to grant full relief sought in superior court case (Const. art. 6, § 4b, adopted Nov. 1928).

* * *

Action by Francis Martin against Al Rosen. Judgment for the defendant, and the plaintiff appealed and applied for writ of injunction, and temporary restraining order was issued.

Writ of injunction issued.

Loeb, Walker & Loeb, of Los Angeles, and Walter S. Hilborn, of New York City, for appellant.

MacCarthy & Rosen and Franklin B. MacCarthy, all of Hollywood, for respondent.

WILLIS, Justice pro tem.

Respondent sued appellant in the municipal court of the city of Los Angeles in case numbered 334809 of the files of that court for the recovery of $525, alleged balance unpaid on an employment agency contract. Appellant answered denying any indebtedness and pleaded illegality of the contract sued upon, and then commenced an action in the superior court against respondent to recover the sum of $2,520, alleged to have been paid by him to respondent under the same contract sued upon in the municipal court action, which contract it is alleged is illegal and void by virtue of the provisions of section 11 of Act No. 2349 of the General Laws of California, relating to employment agency contracts. A temporary restraining order was issued therein restraining respondent, during the pendency of that action, from further proceedings in the municipal court. A demurrer to the complaint was sustained without leave to amend and judgment was entered that appellant take nothing, from which appeal has been taken. On motion in the court below the temporary restraining order was vacated. Appellant by this proceeding now seeks similar injunctive relief pending the appeal. A temporary restraining order and order to show cause was issued herein, and the matter is submitted after hearing thereon.

By article 6, section 4b, of the Constitution, District Courts of Appeal have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and all other writs necessary or proper to the complete exercise of their appellate jurisdiction. In respect to the same power granted to the Supreme Court, it has been held that this constitutional provision authorizes issuance of the writs enumerated therein where no other appropriate or adequate remedy has been provided, but limits the power of the Supreme Court to issue the nonenumerated writs to cases only in which it is necessary and proper to the complete exercise of its appellate jurisdiction. Hyatt v. Allen, 54 Cal. 353.

There are a number of early decisions of the Supreme Court, falling into a group because of similarity of results, which appear to deny the existence of power in appellate courts to issue the writ of injunction as distinguished from the writ of supersedeas. These cases begin with Hicks v. Michael, 15 Cal. 107, holding that the Legislature had not given that court power to grant a temporary injunction pending appeal from an order denying the same injunction, and followed by Swift v. Shepard, 64 Cal. 423, 1 P. 493, which cites the Hicks Case, supra, as authority, deciding that to stay operation of a perpetual injunction on appeal from the judgment granting it would in effect modify such judgment before the appeal was heard, and that in such an appeal there existed no impediment to the exercise of appellate jurisdiction. This was followed by Dulin v. Pacific W. & C. Co., 98 Cal. 304, 33 P. 123, denying a supersedeas in an appeal from a judgment adjudging which of two parties had been elected director of a corporation on the ground that it was sought to perform the functions of an injunction to restrain the party to the action from asserting rights other than those of using process of the court to enforce the judgment, and that appellant had no greater present right to an injunction against his rival than he had before judgment. Next came Rose v. Mesmer, 131 Cal. 631, 63 P. 1010, which cites the Dulin Case as authority, in which the court refused a restraining order, pending appeal from a judgment adjudging that none of the parties had any right to maintain a certain dam then existing on a creek, to restrain a threatened removal of such dam, holding that such action would be exercising original jurisdiction to enjoin a trespass, of which jurisdiction such court was lacking. The last of this group is Southern Pacific Co. v. Smith, 171 Cal. 8, 151 P. 426, which relies on the Hicks Case for authority, in which supersedeas was denied on appeal from a judgment denying injunctive relief on the ground that to grant such relief would not be relief in aid of appellate jurisdiction and because the court had no original jurisdiction in injunction matters.

In the light of these cases denying the use of injunctive relief in the instances therein described, the vital question presented by the application herein arises. It may be stated as follows: May the appellate court exercise the power of injunction as an aid to its appellate jurisdiction, by issuance of a restraining order to restrain respondent in a case on appeal from the superior court from further proceedings in another case between the same parties pending in a municipal court, which involves the same subject-matter and embraces the same issues of fact as those in the appealed case but in which the municipal court has not jurisdiction to grant the full relief sought in the appealed case? Or, stated in another form: Is the issuance herein of such writ of injunction necessary or proper under the stated circumstances to the complete exercise of our appellate jurisdiction?

That relief by injunction of the character above described may be granted by superior courts under the circumstances above stated has long been recognized in this state and extensively used in practice since the organization of the municipal courts in 1925. Gregory v. Diggs, 113 Cal. 196, 45 P. 261; Engleman

v. Superior Court, 105 Cal. App. 754, 288 P. 723; Todhunter v. Smith, 219 Cal. 690, 28 P. (2d) 916, 918. In the latter case the court said: "There is authority which holds that, where the defendant in a justice court action has a counterclaim arising out of the transaction upon which the complaint is founded which is beyond the jurisdictional limit of the justice court, such defendant may bring an action in the superior court and compel the plaintiff in the justice court action to litigate the entire controversy in the superior court. To this end such defendant may procure an injunction restraining further prosecution of the justice court action. Gregory v. Diggs, 113 Cal. 196, 45 P. 261; Engleman v. Superior Court, supra. No reason exists why the same rule should not apply where the original action is in the municipal court." It has also been held that the superior court, sitting as a court of equity, has the power to suspend the operation of an injunction to which it has decided a party is entitled, pending an appeal from the judgment, for the purpose of preserving the status quo of the subject-matter of the action and protecting the appellant from having his right of appeal rendered nugatory or merely nominal if he should succeed. Tulare Irrigation Dist. v. Superior Court, 197 Cal. 649, 242 P. 725.

In respect to similar power in appellate courts, it was held at an early date by the Supreme Court that in the absence of any specific prohibition in the Constitution that court would undoubtedly have the power to issue all writs necessary to the complete exercise of its jurisdiction, and that the present clause in the Constitution does not affect the power of the court in that respect. Hyatt v. Allen, supra. And it has since been repeatedly held that the appellate courts have inherent power to secure to the appellant the fruits of a successful appeal, if it can be done without depriving the respondent of a substantial right, by issuance of writs to restrain the enforcement of judgments pending appeal. Hill v. Finnigan, 54 Cal. 493; Luckenbach v. Krempel, 188 Cal. 175, 204 P. 591, and cases therein cited; Messenkop v. Duffield, 211 Cal. 222, 294 P. 715. In Nonpareil Mfg. Co. v. McCartney, 143 Cal. 1, 76 P. 653, the court, in granting an application for supersedeas, approved the rule announced in Hill v. Finnigan, supra, and following this the court later, in Segarini v. Bargagliotti, 193 Cal. 538, 226 P. 2, decided that under the rule stated in Nonpareil Mfg. Co. v. McCartney it had power to grant the writ of supersedeas under the circumstances of that case in order to preserve the status quo until the final determination of the action. In Rosenfeld v. Miller, 216 Cal. 560, 15 P.(2d) 161, it was held that the writ of supersedeas may issue in aid of appellate jurisdiction when it appears necessary to preserve the rights of a litigant, and therein the court quoted with approval the statement in the case of Segarini v. Bargagliotti, supra, to the effect that such writ may be granted to preserve the status quo pending appeal.

To the same effect, see the opinion of the late Presiding Justice Works in the case of In re Albori, 95 Cal. App. 42, 272 P. 321, wherein the writ of probable cause was held to be issuable under an appropriate state of facts to enable a complete exercise of appellate jurisdiction, and as a means of preserving the fruits of victory in the event of a reversal of the judgment appealed from.

[1-5] The writ of supersedeas and the writ of probable cause are among the "other writs" mentioned in the constitutional provision above referred to. Each is an auxiliary process designed to supersede the enforcement of the judgment of a trial court brought up for review. We have noted from the foregoing authorities that the appellate courts have inherent as well as constitutional power, in the exercise of their appellate jurisdiction, to stay proceedings on the judgment or order appealed from, for the purpose of preserving the status quo of the case pending appeal and thus secure to appellant the fruits of victory on such appeal. And we readily recognize that this object and purpose constitutes the distinguishing features between these later cited cases and the group cited earlier herein; for in the earlier group there was absent the purpose and object which motivated the action of the court in the later cited cases. The writ of injunction is likewise one of the other writs included in the constitutional provision. If, as hereinabove shown, there exists power in appellate courts to issue the writs of supersedeas and probable cause in aid of their appellate jurisdiction to stay proceedings or execution on the judgment or order appealed from in order to preserve the status quo of the subject-matter of the action, and to "secure to the appellant the fruits of an appeal," there surely can be no obstacle in the way of those courts to the issuance of the writ of injunction restraining a respondent from doing acts, during pendency of an appeal, extrinsic to execution of the judgment appealed from and therefore outside the realm of supersedeas, which will destroy the status quo of the subject-matter being litigated and result in depriving appellant of the fruits of a successful appeal.

We are convinced, therefore, that power exists in this court to preserve the status quo of the case on appeal as it existed at the commencement of the action in the court below, and that the facts of this case require its exercise.

It is ordered that a writ of injunction issue herein enjoining and restraining respondent and his attorneys and agents from trying or proceeding further with action numbered 334809 of the files of the municipal court of the city of Los Angeles, during the pendency of this appeal.

We concur: STEPHENS, P. J.; CRAIL, J.

2 Cal.App.2d 716

GALLICK v. CASTIGLIONE et al.

Civ. 9262.

District Court of Appeal, First District, Division 2, California.

Dec. 10, 1934.

1. Sales 🔑48

Seller's knowledge that goods were bought for illegal purpose is no defense to action for price, if their use for such purpose was not made part of contract and seller did nothing in aid or furtherance of unlawful design.

2. Appeal and error 🔑996

Trial court's fact finding, supported by one of two permissible inferences from evidence, forecloses consideration of question by appellate court, though it might have drawn other inference from same evidence.

3. Intoxicating liquors 🔑327(1)

Trial court's finding, in action for price of sugar sold before repeal of prohibition amendment, that plaintiff's extension of credit to defendants on their promise to pay as soon as whisky produced from sugar came out was not in aid or furtherance of illegal purpose, *held* not error (Const. U. S. Amend. 18).

4. Intoxicating liquors 🔑327(1)

Defendant's testimony, in action for price of sugar sold before repeal of prohibition amendment, that plaintiff told defendant how others were getting more whisky from sugar than defendant, *held* not to require finding that seller acted in aid or furtherance of illegal purpose (Const. U. S. Amend. 18).

5. Intoxicating liquors 🔑327(1)

Seller's mere knowledge of buyer's intent to manufacture intoxicants from sugar purchased before repeal of prohibition amendment did not bring contract within section of National Prohibition Act prohibiting sale of substances intended for use in unlawful manufacture of intoxicating liquor (National Prohibition Act tit. 2, § 18 [27 USCA § 30]; Const. U. S. Amend. 18).

◆

Appeal from Superior Court, San Mateo County; Franklin Swart, Judge.

Action by G. Gallick against N. Castiglione and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

J. E. McCurdy, of San Mateo, for appellants.

Clifford D. Good, of San Francisco, for respondent.

DOOLING, Justice pro tem.

This is an appeal from a judgment against defendants for the price of certain merchandise sold and delivered to them. The materials were sold prior to the repeal of the Eighteenth Amendment to United States Constitution, and appellants defended the action on the theory that the contract of sale was illegal. Specifically defendants alleged in their answer that said materials were sold "for the express purpose of manufacturing intoxicating liquor"; that the seller knew that they were to be used for that purpose, "and actively cooperated with defendants herein in properly utilizing said goods, wares and merchandise for said purpose"; and that the seller "directed said defendants in the proper manner in which to use said goods, wares and merchandise for the purpose of distilling intoxicating liquor therefrom." The court found against this defense, and appellants claim that this finding is not supported by the evidence.

[1] The general rule applicable to such cases is thus stated in California Raisin Growers' Ass'n v. Abbott, 160 Cal. 601, 609, 117 P. 767, 771, quoting from Tracy v. Talmage, 14 N. Y. 176, 67 Am. Dec. 132: "I consider it, therefore, as entirely settled by the authorities to which I have referred, that it is no defense to an action brought to recover the price of goods sold that the vendor knew that

they were bought for an illegal purpose, provided it is not made a part of the contract that they shall be used for that purpose, and, provided, also, that the vendor has done nothing in aid or furtherance of the unlawful design."

[2] We may take it as proved in this case that the seller knew that appellants were buying the goods for the purpose of manufacturing intoxicating liquor. It seems equally clear that it was not made a part of the contract that they should be used for that purpose. The contract was a contract of outright sale, and what appellants did with the goods was no concern of the seller, nor did appellants undertake by their contract to bind themselves to manufacture intoxicating liquor with them. The only question on this phase of the case is whether the evidence was such as to compel a finding that the seller did something in aid or furtherance of the unlawful design. If the evidence is open to two inferences, one of which will support the finding of the trial court, this court is foreclosed by the finding, even though from the same evidence we might have drawn the other inference had we been the triers of fact.

[3] The only evidence relied on by appellants in support of their claim that the court's finding is unsupported in this particular was given by one of appellants. This appellant testified that at his first interview with the seller: "I asked him if I could get credit for a certain amount of sugar—told him I would pay him as soon as the product came out.

"Q. What product? A. Whiskey. He said: 'All right.'"

It is claimed that this extension of credit was in aid or furtherance of the illegal purpose. We cannot hold that the trial court erred in finding that it was not. The seller did no more than to agree to sell to appellants on credit with knowledge of their illegal purpose. To hold that this would bar the seller's recovery would destroy the rule above quoted.

[4] Appellant further testified: "Sometime we would go in and talk things over; he would ask me how I was getting along, ask me what kind of results I was getting out of the product; I would tell him and he would say, 'So and so are doing better than you are getting out of it,—get more gallons of whiskey out of a sack of sugar',—give me tip how to work it better. * * * He would tell me how the other boys were doing it."

We may concede that this evidence would have been sufficient to support a finding that the seller acted in aid or furtherance of the illegal purpose. The question is, however, Did it compel such a finding? Passing by the credibility of the witness, and giving it full weight, we cannot hold that it did. It was open to the inference, which we must assume the trial court drew from it, that it was mere passing conversation not acted upon by appellants. Appellant did not testify that he followed any of these tips or was aided in any way by them. Unless the trial court found that the seller advised the buyer how to use the materials in the manufacture of intoxicating liquor and that the buyer followed and was aided by such advice, it cannot be said that the seller did anything "in aid or furtherance" of the illegal purpose.

[5] Appellants, however, claim further that the contract was in violation of the following section of the National Prohibition Act: "It shall be unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula, direction, or recipe advertised, designed, or intended for use in the unlawful manufacture of intoxicating liquor." Act October 28, 1919, c. 85, tit. 2, § 18, 41 Stat. 313 (27 USCA § 30).

The effect of this section upon sales where the buyer knew that the seller intended to use the materials sold in the manufacture of liquor has been directly passed upon in Perko v. Rock Springs Commercial Co., 37 Wyo. 98, 259 P. 520, and Jacobs v. Danciger, 328 Mo. 458, 41 S.W.(2d) 389, 391, 77 A. L. R. 1237. In both cases the courts held that the mere knowledge of the seller that the buyer intended to manufacture intoxicants did not bring the case within the above-quoted section of the United States Statutes, both cases holding that, in addition to knowledge, the design or intent of the seller that the materials should be so used must be established; it not being sufficient to establish the design or intent of the buyer.

In this connection the Supreme Court of Missouri said in Jacobs v. Danciger, supra: "It is not expressly provided in the statute that mere knowledge by the seller of the intended use of the substance by the purchaser is a violation of law. It seems, if the Congress had so intended, it would have provided that it shall be unlawful to knowingly sell any substance intended by the purchaser for such use. It did not do so, but fixed the intention of the seller in making the sale as the test of legality. For this reason we think the word 'intended' was not used in the sense of mere knowledge."

The case of Three Star Food Products Corp. v. Ofsa, 94 W. Va. 636, 119 S. E. 859, 29 A. L. R. 1053, relied on by appellants, is not inconsistent with the two last-cited cases. It went no further than to hold that, where there was evidence from which a jury might find that the article sold was designed or intended for use in the manufacture of intoxicants, the trial court erred in taking that issue from the jury. In Scheeline v. Pezzola, 29 Cal. App. 266, 155 P. 127, also relied upon by appellants, the evidence showed that the seller actively conspired with one of the buyers to violate the law.

While the seller's conduct in this transaction may not have been commendable, his legal rights are in no way affected by that consideration, and we find no error in the findings or judgment.

Judgment affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

2 Cal.App.2d 651

WADSWORTH v. GONZALES et al.

Civ. 1554.

District Court of Appeal, Fourth District, California.

Dec. 6, 1934.

1. Exceptions, bill of 🔑51

Trial judge should either settle bill of exceptions, prepared and filed within time allowed by law, court order, and parties' stipulation, or dismiss proceeding to obtain bill, instead of both dismissing proceeding and refusing to settle bill.

2. Appeal and error 🔑792

Appellate court may dismiss on its own motion, or otherwise, appeal from unappealable order denying motion for new trial.

Appeal from Superior Court, Kern County.

Action by Ida F. Wadsworth against Juan Gonzales and others. From a judgment for defendants, and an order denying a motion for a new trial, plaintiff appeals. On motion to dismiss the appeal.

Motion denied without prejudice.

Charles E. Hobart, of Los Angeles, and J. K. Lilly, of Bakersfield, for appellant.

Borton & Petrini and Osborn & Burum, all of Bakersfield, for respondents.

MARKS, Justice.

This is a motion to dismiss an appeal from a judgment and from an order denying motion for new trial. No bill of exceptions or clerk's or reporter's transcripts have been filed in this court.

A certificate of the county clerk of Kern county filed in support of the motion discloses the following facts: That the action was brought for the recovery of damages suffered in an automobile accident; that on November 23, 1932, the jury returned a verdict in favor of defendants and judgment was entered on the verdict giving them their costs; that a motion for new trial was made; that notice of appeal was filed on February 14, 1933; that on March 30, 1934, the trial judge refused to sign the bill of exceptions on the ground that it did not comply with the provisions of the Code of Civil Procedure; that no proceedings are pending in the trial court for a transcript under the provisions of section 953a of the Code of Civil Procedure.

On November 9, 1934, plaintiff filed in this court her verified petition for a writ of mandate against the superior court of Kern county and the trial judge seeking to force the settlement of the bill of exceptions. This petition was denied without opinion under authority of Derr v. Busick, 63 Cal. App. 134, 218 P. 280.

In addition to the very meager facts set forth in the certificate of the county clerk, we glean the following from the verified petition for the writ of mandate: That a proposed bill of exceptions was prepared and filed within the time allowed by law, order of the court, and stipulation of the parties; that amendments to the proposed bill of exceptions were proposed by defendants; that hearings were had before the trial judge in an endeavor to settle the bill of exceptions on October 28, 1933, November 4, 1933, and February 24, 1934, on which last date the matter of settlement was continued to March 30, 1934; that on that date a motion was made by defendants to dismiss the proceedings for the settlement of the bill of exceptions which was denied by the trial judge at the same time that he refused to settle the proposed bill.

Rule 1 of the Rules of the Supreme Court and District Courts of Appeal provides in part as follows: "The appellant in a civil action, shall, within forty days after an appeal is perfected, except as hereinafter stated or as otherwise provided by law, serve and file the printed transcript of the record duly certified to be correct by the attorneys of the respective parties, or by the clerk of the court from which the appeal is taken. If a proceeding for the settlement of a bill of exceptions which may be used in support of such appeal is pending or may still be instituted, the time aforesaid shall not begin to run until the settled and authenticated bill of exceptions has been filed, or the time in which a proceeding for such a bill of exceptions may be instituted has expired, or such proceeding, if instituted, has been dismissed by the trial court."

[1] A question similar to the one before us was considered by the Supreme Court in the case of Dernham v. Bagley, 151 Cal. 216, 90 P. 543, 544, where it was said: "We have, in this case, a proceeding still pending in the trial court for the settlement of a bill of exceptions for use on the appeal from the judgment. Defendant's claim on this motion, so far as such proceeding for settlement is concerned, is simply that the proposed bill of exceptions on appeal from the judgment was not served by plaintiff within the time allowed by law, or any stipulation of the parties, or valid order of court, and that consequently the court is without jurisdiction to settle the bill. We are satisfied, however, that the words 'when there is a proceeding pending for the settlement of a bill of exceptions,' etc., in the rule above referred to, must be held to include any proceeding looking to the settlement of such a bill actually inaugurated by a party and pending undisposed of, and not abandoned, regardless of all questions as to whether the proceeding can ultimately avail and the bill be legally settled. Those questions are primarily for the trial court to determine, subject to review by this court. This was recognized in Moultrie v. Tarpio, 147 Cal. 376, 81 P. 1112, where it was said that ordinarily this court 'would not undertake to determine on a motion to dismiss an appeal, whether or not a party had so failed to comply with the requirements of the law in regard to the settlement of a bill of exceptions that his pending proceeding for such settlement must ultimately fail, but would leave that question to be determined by the trial judge, subject to review on appeal.' It will readily be seen that this must be the proper rule of practice to be followed wherever a proceeding for the settlement of a bill of exceptions has actually been inaugurated by a party, and is pending undisposed of in the trial court, and the moving party is actively engaged thereunder in attempting to procure the settlement of his bill. It is well settled that the adverse party desiring to avail himself of such an objection must interpose it in the trial court, or before the judge settling the bill, and that if no objection is there made the bill may be settled, and thereafter used on the appeal."

In Curtin v. Ingle, 155 Cal. 53, 99 P. 480, 481, the Supreme Court said: "It is urged by the respondent that this extension of time [provided in the rules of court] within which to file a transcript, after a settled or authenticated bill has been filed, is only available when the party has diligently proceeded with the settlement of such statement or bill, and where a party fails to use such diligence, this court should, upon a showing to that effect, dismiss the appeal. But whether a party has been guilty of laches in that respect or not is primarily a matter for the trial court before whom the proceedings for the settlement of the statement on appeal is pending, and this court should not be called upon originally to determine, on a motion to dismiss an appeal, whether an appellant has been derelict in securing with due expedition such settlement. If, as contended for by respondent, the appellant has been guilty of such laches in proceeding with the settlement as would justify this court in saying that it amounts practically to an abandonment of his appeal, the same point can be urged in the trial court. When the settlement of the statement comes up for hearing there, the respondent may move the court to dismiss the proceedings for a settlement on account of the failure of appellant to proceed with reasonable diligence in procuring a settlement, or may object to the settlement on account of his failure to have done so. If his motion is denied, or his objections are overruled, he can have them incorporated into the record on appeal, and have the action of the court reviewed here. Henry v. Merguire, 106 Cal. 142, 146, 39 P. 599; Ryer v. Rio Land & Imp. Co., 147 Cal. 462, 464, 82 P. 62. And we think this is the course that should be pursued." See, also, Moultrie v. Tarpio, 147 Cal. 376, 81 P. 1112; Raisch Imp. Co. v. Arata, 193 Cal. 573, 226 P. 399, 34 A. L. R. 51; Curtin v. Ingle, 9 Cal. App. 241, 98 P. 868; Union Collection Co. v. Oliver, 23 Cal. App. 318, 137 P. 1082; Baker v. Eilers Music Co., 24 Cal. App. 348, 141 P. 395; and Brown v. Cobb, 63 Cal. App. 533, 219 P. 78.

In the instant case the trial judge should either settle the bill of exceptions or dismiss the proceedings to obtain one now pending in the court below.

[2] Motion to dismiss the appeal is denied without prejudice to the making of another such motion at a future time and the right of the court to dismiss on its own motion or otherwise the attempted appeal from an unappealable order.

We concur: BARNARD, P. J.; JENNINGS, J.

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2 Cal.App.2d 747

WADSWORTH v. GONZALES et al.

Civ. 1555.

District Court of Appeal, Fourth District, California.

Dec. 6, 1934.

1. Exceptions, bill of 🔑51

Trial judge should either settle bill of exceptions, prepared and filed within time allowed by law, court order, and parties' stipulation, or dismiss proceeding to obtain bill, instead of both dismissing proceeding and refusing to settle bill.

2. Appeal and error 🔑792

Appellate court may dismiss on its own motion, or otherwise, appeal from unappealable order denying motion for new trial.

◆

Appeal from Superior Court, Kern County.

Action by Winifred Wadsworth against Juan Gonzales and others. From a judgment for defendants and an order denying a motion for a new trial, plaintiff appeals. On motion to dismiss the appeal.

Motion denied without prejudice.

Following Wadsworth v. Gonzales (Cal. App.) 38 P.(2d) 860.

Charles E. Hobart, of Los Angeles, and J. K. Lilly, of Bakersfield, for appellant.

Borton & Petrini and Osborn & Burum, all of Bakersfield, for respondents.

MARKS, Justice.

[1, 2] This is a motion to dismiss an appeal from a judgment and from an order denying a motion for new trial. The facts are identical with those in the case of Ida F. Wadsworth v. Juan Gonzales (Cal. App) 38 P.(2d) 860, the opinion in which case is this day filed.

Upon the authority of that case, and for the reasons there given, the motion to dismiss the appeal is denied without prejudice to the making of another such motion at a future time and the right of the court to dismiss on its own motion or otherwise the attempted appeal from an unappealable order.

We concur: BARNARD, P. J.; JENNINGS, J.

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3 Cal.App.2d 194

SMYTH v. HARRIS & DEVINE et al.

Civ. 9465.

District Court of Appeal, First District, Division 2, California.

Dec. 19, 1934.

1. Automobiles 🔑211

Application of rule that one driving automobile at night at such speed that he cannot stop within radius illuminated by his lights is guilty of contributory negligence, barring recovery for injuries proximately caused thereby, depends on degree of darkness and driver's familiarity with neighborhood.

2. Negligence 🔑122(1)

Burden of presenting defense of contributory negligence rests on defendant.

3. Automobiles 🔑242(8)

Defendant, claiming that plaintiff in action for injuries in collision between his automobile and defendants' parked truck at night was driving in strange neighborhood and hence contributorily negligent in driving at such speed that he could not stop within distance illuminated by his lights, should have shown such fact.

4. Judgment 🔑199(3)

On defendants' motion for judgment notwithstanding verdict for plaintiff on ground of latter's contributory negligence, presumption is that he acted in exercise of ordinary care.

5. Automobiles 🔑211

Motorist, exercising ordinary care in driving along familiar street at night, had right to presume that street in front of him would not be obstructed unlawfully or in such manner as to cause him injury.

6. Appeal and error 🔑934(1)

Appellate court must assume on appeal from judgment for defendants notwithstanding verdict for plaintiff in action for injuries in collision between latter's automobile and defendants' parked truck at night that plaintiff was familiar with street and condition thereof where record shows nothing to contrary.

7. Automobiles 🔑245(83)

Motorist driving on wet paved street, familiar to him, on dark rainy night through intersection, at which overhead light cut down illuminating vision of automobile headlights to from 20 to 30 feet ahead, at such speed that he could stop in 45 to 50 feet, *held* not, as matter of law, guilty of contributory negligence barring recovery for injuries sustained in collision with unlighted parked truck, which he failed to see until 8 or 10 feet therefrom, some distance beyond intersection.

◆

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Sidney L. Smyth against Harris & Devine, a copartnership, and another. Judgment for defendants, and plaintiff appeals.

Reversed, with direction.

S. M. Saroyan and J. Francis Shirley, both of San Francisco, for appellant.

Decoto & St. Sure, of Oakland, for respondents.

STURTEVANT, Justice.

The plaintiff commenced an action to recover damages for injuries suffered in an automobile collision. After all of the evidence had been received, the defendants made a motion for a directed verdict. The motion was denied, and the jury returned a verdict in favor of the plaintiff. The entry of judgment was stayed, and thereafter the defendants made a motion that the verdict be set aside and judgment be entered in their favor notwithstanding the verdict. That motion was granted, and, from the judgment entered in favor of the defendants, the plaintiff has appealed.

On the evening of March 11, 1933, the defendant Turner had driven a truck owned by the other defendants, his employers, from Modesto to Oakland. Having reached Oakland, he drove the truck westerly on East Fourteenth street to a point some distance west of Fifty-seventh avenue. At that point he drove to the right-hand side of the street and parked the truck and trailer and alighted and went diagonally across the intersection to a coffee shop where he ate a sandwich. In a little while he returned to the truck, put out the lights, entered the cabin, removed his shoes, and went to sleep. Across the street there was an overhead street light which threw its rays from 50 to 75 feet. Turner remained asleep in the cabin of the truck until after the accident had occurred.

In the meantime the plaintiff and his associates had held a whist party. At about 11 o'clock their host served them a hot toddy. Each had one drink. Between 1 and 2 o'clock in the morning the plaintiff and two young ladies left for their homes. In his 1929 model of a Ford convertible coupé the plaintiff started to drive them to their respective homes. Eleanor Iverson was taken to her home near Sixty-Sixth avenue and East Fourteenth street, where she alighted. Thereafter plaintiff and Kathleen Iverson proceeded to East Fourteenth street, where they turned westerly and proceeded on the right-hand side. As the plaintiff drove westerly on East Fourteenth street, he passed a number of cars parked at the curb, clearing them by 2 or 3 feet. Approaching Fifty-Seventh avenue, he changed his course and approached closer to the northerly curb. He was traveling between 23 and 25 miles per hour. The headlights of his car were illuminated, his windshield wiper was working, and he could see 30 to 60 feet ahead—clearly 30 to 40 feet. At the intersection of Fifty-Seventh avenue and East Fourteenth street, the illuminating vision of his headlights was cut down to from 20 to 30 feet ahead due to a large overhead illuminating light on the southwest corner of Fifty-Seventh avenue and East Fourteenth street. As the plaintiff came into this intersection, he was traveling about 25 miles per hour. Once in the intersection plaintiff slowed down to 20 to 22 miles per hour. Traveling at that speed under the atmospheric condition prevailing and the condition of the pavement the plaintiff testified that he could stop his car within 45 to 50 feet, provided he did not skid. The night was dark, the pavement was wet, and a rain was falling at the time of the accident. The foregoing is a condensed summary of the testimony given by the plaintiff. The distances, it may be assumed, were his estimates as he was not asked if he had made any experiments or measurements. For seven or eight years before the accident he had been enlisted in the navy, but had a local residence with his brother in Oakland. East Fourteenth street is 72 feet wide and Fifty-Seventh avenue is 36 feet wide. The truck and trailer were painted blue and loaded with barrels. Their length over all was 54 feet 8 inches; to the top of the load was 11 feet. As the plaintiff approached the spot, the reflectors in the safety zone were seen and about the same time an automobile approached from the west. The light of that automobile to some extent shone in the face of the plaintiff. The plaintiff was looking straight ahead, but testified that he did not see the trailer until he was 8 or 10 feet from it. He then threw on his brakes, but he was unable to avoid the collision. The record does not disclose that the plaintiff was unfamiliar with the locality where the accident happened and the territory immediately adjacent thereto.

[1-7] The plaintiff asserts that the trial court erred in granting the motion of the defendants. The latter reply that the motion was properly granted because under the facts the plaintiff was guilty of contributory negligence. They summarize the facts as follows:

"That on the evening in question he was driving his automobile on a paved street, which pavement was wet; that the speed of his car varied between 20 to 25 miles per hour; that his car was equipped with headlights, illumination of which he could see from 25 to 40 feet ahead, depending upon other lighting conditions; that there was nothing between the front of his car and the rear end of the trailer at any time to obstruct his vision of the same; that he did not see the trailer until he was within 8 to 14 feet of the same; that at the time he saw the truck and trailer there was no obstruction of any kind in the street to the left of the truck and trailer which prevented his turning and passing said truck and trailer; that just preceding the accident he could see ahead from the illumination of his headlights a distance of 30 feet; that his car was equipped with brakes with which, traveling at a speed between 20 and 22 miles per hour, he could stop said car within 45 to 50 feet, provided he did not skid." Thereupon they cite and rely on Ham v. County of Los Angeles, 46 Cal. App. 148, 189 P. 462. That decision is not controlling. The court was there considering an appeal from an order granting a motion for a new trial. In the instant case we are considering a motion for judgment notwithstanding the verdict of the jury. There is much difference between the power of the court when passing on a motion for a new trial and when ruling on a motion for judgment notwithstanding the verdict of the jury. Estate of Flood, 217 Cal. 763, 768, 21 P.(2d) 579. Furthermore, the defendants under the evidence never brought themselves within the doctrine stated by the court in Ham v. County of Los Angeles, supra. In that case the trial court had given a certain instruction. It was claimed that it had committed error in doing so. On page 158, of 46 Cal. App. 189 P. 462, 466, the court said: "Such instruction does not take into account *the degree of darkness of the night or known conditions of the road.* But we are not prepared to say that negligence may not be predicated as a matter of law, irrespective of any positive law as to speed limits, where an automobile is being driven in the night on any part of the highway, and where the driver is dependent upon the lights of his machine for knowledge of the condition of the road and the traffic upon it, and runs into an obstruction, if he drives at a rate of speed which will not permit him to stop or slow up within the radius illuminated by his lights, and the accident is proximately caused thereby." (Italics ours.) That case was based on Lauson v. Fond du Lac, 141 Wis. 57, 123 N. W. 629, 630, 25 L. R. A. (N. S.) 40, 135 Am. St. Rep. 30. At page 59 of 141 Wis., 123 N. W. 629, the Supreme Court of Wisconsin said: "The question for this court to solve is whether the driver of an automobile, who, on a *dark rainy night*, is traveling over a straight stretch of *strange country* road, is exercising ordinary care if he drives his machine at such a rate of speed that he is unable to stop within a distance that is within the clear range of his vision. Stated in another way, if he can see objects but 10 feet ahead, while he cannot stop his car in less than 20 feet, is he using ordinary care? If not, and injury results from his negligent act, neither he nor his passengers, if the conveyance be a private one, can recover damages for such injury." (Italics ours.) That the application of the rule depends on the question as to the degree of the darkness and the driver's familiarity or unfamiliarity with the neighborhood in which he is driving is shown by the decisions from which we have just quoted. The same distinction is noted in Haynes v. Doxie, 52 Cal. App. 133, 198 P. 39; Wurl v. Watson, 67 Cal. App. 625, 228 P. 43; Gammon v. Wales, 115 Cal. App. 133, 300 P. 988; Smarda et al. v. Fruit Growers' Supply Co. et al. (Cal. App.) 36 P.(2d) 701.

It is settled law that the burden of presenting the defense of contributory negligence rests on the defendant. If these defendants claim that the plaintiff was driving in a strange neighborhood, they should have shown the fact. In making the motion which they made, certain presumptions and inferences stood in favor of the plaintiff. It is presumed that he was acting in the exercise of ordinary care. While himself exercising ordinary care, he had the right to presume that the street in front of him would not be obstructed unlawfully or in such manner as to cause him injury. Gammon v. Wales, supra. Nothing to the contrary appearing in the record, we must assume the plaintiff was familiar with the street he was traveling and the condition thereof. Under all of these circumstances we are unable to say that the acts of the plaintiff, as a matter of law, constituted contributory negligence.

The judgment appealed from is reversed, and the trial court is directed to enter its judgment on the verdict as returned by the jury.

We concur: NOURSE, P. J.; SPENCE, J.

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3 Cal.App.2d 366

PEOPLE v. ABDULLAH.

Cr. 2583.

District Court of Appeal, Second District, Division 2, California.

Dec. 27, 1934.

Hearing Denied by Supreme Court Jan. 25, 1935.

Criminal law 🔑1180
Rape 🔑51(1)

Evidence *held* to support conviction of rape where specific act was testified to directly together with date, and child born to complaining witness after first trial, at which evidence was insufficient, was exhibited to jury, since such evidence was substantially different than that at first trial.

◆

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Ahmed Abdullah was convicted of rape, and he appeals.

Affirmed.

Hearing denied by Supreme Court; CURTIS and LANGDON, JJ., dissenting.

Paul Barksdale D'Orr and Thomas A. Reynolds, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

STEPHENS, Presiding Justice.

Defendant was heretofore convicted of two counts of rape and on appeal judgment of conviction and order denying motion for new trial was reversed. People v. Abdullah, 134 Cal. App. 155, 25 P.(2d) 40, 42. On the second trial the jury acquitted him on count 1, pursuant to the court's instruction, and convicted him on count 2, which charged an act alleged to have occurred September 25, 1932. Defendant again appeals from the judgment and order denying motion for new trial.

The opinion of this court on the first appeal sets out the testimony in substance and declares: "We think the evidence as to these specific acts was so unsubstantial as to amount practically to no evidence at all." In the retrial, the specific act is testified to directly, together with the date upon which it is claimed to have occurred.

In the interim between the first and second trials, a child was born to the complaining witness and it is claimed Abdullah is its father. This child was exhibited to the jury. It is claimed in this appeal that the evidence adduced at the second trial was not materially, essentially, or substantially different from that adduced upon the first trial. In re Estate of Baird, 193 Cal. 225, 223 P. 974. The difference mentioned above, however, goes to the very essence of the cause for reversal of the first conviction and is substantial. In that trial the witness testified generally, in the last trial she was specific. It is true that the cross-examination revealed at best very faulty memory of events that would be likely to fix the specific act in her mind separate and apart from a series of acts testified to in the first trial but not in the second trial. We are not prepared, however, to say that this condition of the testimony should nullify its legal effect. The jury heard it and believed it. The trial judge refused a new trial. We think the ruling on the motion for new trial must be sustained and that the judgment must be affirmed, and it is so ordered.

We concur: CRAIL, J.; WILLIS, Justice pro tem.

MEYER v. KIRKWOOD et al. *

CASE v. SAME et al.

Civ. 1487.

District Court of Appeal, Fourth District, California.

Dec. 12, 1934.

Hearing Granted by Supreme Court Feb. 7, 1935.

1. Principal and agent 🔑23(1)

In actions for labor performed and for material furnished in improving property at request of alleged agent of person proposing to take property in exchange, evidence *held* insufficient to make out prima facie case of agency for purpose of ordering improvement.

2. Principal and agent 🔑22(2)

Statement of alleged agent that work to be performed by plaintiffs was to be charged to person proposing to take property in an exchange of properties *held* inadmissible to establish agency, in absence of prima facie showing of authority from other evidence.

3. Principal and agent 🔑190(3)

In action for labor performed and material furnished in improving property wherein amended complaint sought to charge defendants as principals, evidence of one defendant's use of "we" in dealing with plaintiffs, in absence of evidence that plaintiffs dealt with him other than as agent, *held* insufficient to impose liability upon alleged agent as a principal (Civ. Code, § 2343).

4. Principal and agent 🔑155(4)

Person purporting to act as agent could not be held liable as principal in absence of evidence showing that he had not in good faith believed that he had authority to act for reputed principal (Civ. Code, § 2343).

5. Appeal and error 🔑882(3)

Where case had been tried upon another theory, liability could not be imposed upon agent for breach of warranty as to his authority, in absence of appropriate pleadings, evidence, and findings.

◆

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Actions by Robert V. Meyer and by George S. Case against M. M. Kirkwood, John F. White, and others, which were consolidated for purpose of trial. From a judgment for the plaintiff as against the named defendants in each case, the named defendants appeal.

Reversed.

Leonard J. Meyberg, Paul M. Joseph, and P. N. McCloskey, all of Los Angeles, for appellants.

Walter C. Davison, of Riverside, for respondents.

BARNARD, Presiding Justice.

These two actions were tried together and have been consolidated on this appeal. The respective plaintiffs furnished the labor and material for certain improvements which were made on a tract of land in Riverside county. Each plaintiff filed a notice of claim of mechanic's lien in which it was alleged that all of said work and materials were furnished to and at the request of M. M. Kirkwood, through her agent, Jack F. White. A complaint to foreclose the lien and for personal judgment was then filed by each plaintiff, in which it was alleged that M. M. Kirkwood, through her agent, Jack F. White, employed the plaintiff to do the work described, and that the said M. M. Kirkwood, through her said agent, Jack F. White, agreed to pay a named amount for the improvement in question, a copy of the notice of claim of lien being attached to the complaint. Amended complaints were filed containing the same allegations. Subsequently, a second amended complaint was filed in each case in which it was alleged that "defendants M. M. Kirkwood and John F. White, also known as Jack F. White, employed plaintiff as original contractor," and that all of the materials and labor used were furnished "to and at the request of said defendants M. M. Kirkwood and John F. White." Copies of the respective notices of claim of lien were also attached to the second amended complaints.

At the trial of the action no effort was made to establish or foreclose the liens, a nonsuit was granted in favor of the owners of the land, and the action was tried on the plaintiffs' theory that the defendant White, in ordering the work done, had acted both for himself and as agent for the defendant Kirkwood, and that the two were jointly liable. The court found, with respect to each case, that the defendant Kirkwood and the defendant White employed the plaintiff to do the work, and that the defendants Kirkwood and White agreed to pay the plaintiff a certain amount therefor. No findings were made as to agency or as to any other facts which might impose liability upon either of the defendants. Judgment was entered against both defendants in each case, from which judgments these appeals were taken.

[1, 2] With respect to the general situation out of which these cases arose, it appears

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 48 P.2d 30.

that the appellant Kirkwood signed a written proposition to exchange certain property owned by her for the real property on which the improvements here in question were made. This instrument was delivered to a real estate broker by the appellant White, who was a son-in-law of Mrs. Kirkwood. White later signed a written escrow agreement relating to the proposed exchange, signing the same "M. M. Kirkwood by J. White." While the matter was in escrow the real estate broker introduced White to these respondents as the agent for Mrs. Kirkwood, who was purchasing this property. White met the respondents on the land, and some agreement was made between them, as a result of which the respondents performed the work. However, the escrow referred to was never closed, Mrs. Kirkwood never became the owner of the property, and this action followed.

The first point to be considered is whether the findings, to the effect that Mrs. Kirkwood ordered the work done and agreed to pay for the same, are sustained by the evidence. The respondents testified that they had never seen nor talked with Mrs. Kirkwood and she is liable, if at all, on the theory that White was acting as her agent in ordering the improvements made. The respondents rely upon the following circumstances as showing that White was the authorized agent of Mrs. Kirkwood for this purpose: That White signed the escrow instructions as Mrs. Kirkwood's agent; that he signed a criminal complaint charging two other persons with stealing certain personal property from this land, alleging that the stolen property was owned by Mrs. Kirkwood; that he orally directed the respondents to do this work telling them, in response to their inquiry, that Mrs. Kirkwood was to be billed for the work, and that the account was to be carried in her name; that one of the respondents wrote to White saying he was ready for some alfalfa seed, and White wrote back saying that he had wired the Germain Seed & Plant Company to send him the seed; that on taking the matter up with the Germain Seed & Plant Company this respondent was told that they had received an order for the seed, but that the same would not be shipped until it was paid for; that a few days later the seed was shipped to and received by this respondent; that a sales tag in possession of the Germain Seed & Plant Company showed that the seed was ordered in the name of "Mr." M. M. Kirkwood on March 24, 1930, and that the seed had been paid for on April 1, 1930; that White personally signed and gave to the real estate agent a statement giving a selling price for this land, enumerating certain items including the two claims involved herein; that after the work was completed White told one of the respondents that he would send him a check and told the other respondent that he would have to wait a few days for his money; and that Mrs. Kirkwood personally signed a written notice of rescission in connection with the escrow above referred to.

Assuming that White's statement that the work was to be charged to Mrs. Kirkwood is a declaration that he was her agent in this transaction, under well-established rules the same cannot be considered for the purpose of establishing such agency unless a prima facie showing of authority appears from the other evidence. Union Const. Co. v. Western Union Tel. Co., 163 Cal. 298, 125 P. 242. While the respondents contend that such a prima facie case appears from the other circumstances referred to, we are unable to see how this contention can be sustained. If it sufficiently appears that White was Mrs. Kirkwood's agent in so far as the attempted purchase of this real estate is concerned, none of the matters in connection with that transaction go any further than to show his agency for that purpose. It was necessary for the respondents to also show that White was her agent in the matter of ordering these improvements. Mrs. Kirkwood testified that she had never heard of the improvements and knew nothing about them until she was served with the complaints in these actions. While the respondents testified that White told them that "we will furnish the seed from the Germain Seed Company" and that "we expect to develop this ranch into an alfalfa ranch," he had disclosed to them that he was claiming to act for Mrs. Kirkwood, and they made no attempt to verify his claim of authority to act for her. Great reliance is placed upon the fact that the sales slip for the seed was in the name of "Mr." M. M. Kirkwood. There is no evidence as to who ordered the seed other than the fact that White wrote to one of the respondents saying that he had wired the seed company to send the seed. It does not appear who paid for it, there is absolutely no evidence to the effect that Mrs. Kirkwood either purchased the seed or knew anything about it, and she herself testified to the contrary. No knowledge of this transaction or of the fact that White was pretending to act therein for her was brought home to Mrs. Kirkwood in any manner whatever, so far as disclosed by the evidence. If respondents' contention is correct, any person who intrusts a signed proposal to exchange properties to another for delivery to a broker is liable for any improvements that may be ordered by such other person for the new property sought to be acquired, whether or not the new property is actually acquired, and regardless of the fact that such first person knew nothing about any such improvements. The mere statement of the proposition is sufficient refutation thereof. In so far as appellant Kirkwood is concerned, there is an entire lack of any evidence to support either the allegations of the complaint or the findings.

[3-5] The next question is whether the evidence sustains the findings that White personally ordered the work and agreed to pay for it. Although the second amended complaints disclose a complete change in respondents' theory in this respect, and although an attempt was therein made to charge both appellants as principals in this transaction, it was necessary for the respondents to sustain such allegations by proof. The respondents argue that White's statements that "we expect to develop this ranch into an alfalfa ranch," "we will furnish the seed from the Germain Seed Company," and "we will take care of you as soon as I get back," evidence an intention on his part to "superadd his personal liability to that of his principal, Kirkwood." Under the circumstances, these statements indicate no more than that White claimed to be acting for Mrs. Kirkwood, and it is thoroughly established that the respondents dealt with him only as the agent of Mrs. Kirkwood, and that they did not understand that he was speaking for himself or intend to contract with him individually. One of the respondents testified that when the work was ordered, in the presence of the other respondent, he asked White if the work was to be billed to him, and that White replied, "No, to Mrs. Kirkwood." He further testified directly that all of the work was furnished at the request of M. M. Kirkwood through her agent Jack F. White, and as follows:

"Q. Were any of the materials,—or was any of the work furnished for the account of any one other than M. M. Kirkwood by you? A. No.

"Q. In other words, all the work you did and materials you furnished were for Mrs. Kirkwood. Is that right? A. That is right."

It was then stipulated that the other respondent would testify to the same effect. Under these circumstances, if White was liable at all, it would be, not as one of the contracting parties, but because he assumed to act as an agent for Mrs. Kirkwood without having the authority to so act. Assuming that under some circumstances White could be held as a principal in this matter under section 2343 of the Civil Code, such a result could not obtain in the absence of evidence showing that he had not in good faith believed that he had the authority to act for her. Nichols G. & M. Co. v. Jersey Farm D. Co., 134 Cal. App. 126, 24 P.(2d) 925. There are no pleadings, evidence, or findings to that effect here. The case was tried upon another theory entirely, and it would require appropriate pleadings, evidence, and findings to impose liability upon White for a breach of warranty as to his authority to act for Mrs. Kirkwood.

In our opinion, neither the findings nor the evidence support the judgment entered in either of the cases as against either of the appellants.

For the reasons given, each of the judgments appealed from is reversed.

We concur: MARKS, J.; JENNINGS, J.

* * *

3 Cal.App.2d 261

EVERTS v. WILL S. FAWCETT CO.

Civ. 1108.

District Court of Appeal, Fourth District, California.

Dec. 20, 1934.

1. Continuance 🔑46(5)

Where affidavit for continuance to assemble evidence in case which had been at issue for several months failed to make definite showing of diligence, to clearly allege facts showing what evidence was desired, materiality thereof, and that evidence would be available within reasonable and definite time, denial of continuance *held* not error.

2. Continuance 🔑22, 46(5, 8)

Trial court has large discretion in granting or denying continuance for purpose of continuing search for evidence, and no abuse of discretion appears in absence of clear showing that certain material evidence exists and that it will be available within reasonable time if continuance is granted, together with satisfactory showing of due diligence

3. Continuance ⚷47

Where defendant's affidavit for continuance on ground that principal witness was sick and that chief counsel for defendant was engaged in another matter was contradicted by evidence that chief witness had been seen about city, and defendant was represented by other able counsel, denial of continuance *held* not error, especially in absence of a showing that evidence admittedly necessary to establish defense and to obtain which continuance had been refused, would be available at any time.

◆

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by H. W. Everts against the Will S. Fawcett Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

See, also, 136 Cal. 754, 29 P.(2d) 801.

Oscar Lawler and Jud R. Rush, both of Los Angeles, for appellant.

Clarke & Bowker and A. S. Goldflam, all of Los Angeles, Hickcox & Trude, of Brawley, and Louis Ferrari, of San Francisco, for respondent.

BARNARD, Presiding Justice.

This is an action on certain promissory notes totaling $175,000, which were given by the defendant to the plaintiff's assignor, the Bank of America National Trust & Savings Association. In its answer the defendant denied the allegations in the complaint with reference to the assignment of the various notes and, as an affirmative defense and by way of counterclaim and set-off, alleged that some three years prior to the execution of these notes it had been induced to exchange certain stock in the Bank of Italy Trust & Savings Association, and in Bancitaly Corporation, for certain stock in the Transamerica Corporation, by and through certain fraudulent misrepresentations made by plaintiff's assignor with respect to the value of the last-named stock. Among other things, it was further alleged in this answer, which was filed on December 28, 1932, that the defendant began an investigation as to the value of this stock during the months of June, July, and August, 1932, and that it discovered, in October, 1932, that the stock in question was of a named value very much less than that represented. It was then alleged that the defendant had been damaged through these misrepresentations in the sum of $784,441.

A demurrer to the answer was overruled on March 1, 1933, and on March 7, 1933, the plaintiff filed notice that he would move the court on March 20, 1933, to set the cause for trial. For some reason which does not appear, the court entered an order on March 10, 1933, setting the cause for trial on May 22, 1933. On March 20, 1933, when plaintiff's motion to set for trial was called for hearing, the court, on motion of the defendant, entered an order vacating its previous order setting the same for trial and resetting the case for October 9, 1933. Thereafter, on April 7, 1933, and after notice duly given, the court vacated its order setting the cause for trial on October 9th and reset the same for May 22, 1933. Notice of this last order was served on the defendant on April 11, 1933. On May 19, 1933, the defendant moved for a continuance on the ground that the same was necessary in order to permit it to take certain depositions and produce certain evidence, as referred to in an affidavit filed in support of the motion. A counter affidavit was filed and, after argument, the motion for a continuance was denied. When the case was called on May 22, 1933, the defendant again moved for a continuance for a period of at least thirty days on the grounds that Will S. Fawcett, president of the defendant corporation and the principal witness therefor, was ill and would be unable to be present for a period of at least seven days and that Oscar Lawler, chief counsel for the defendant, was engaged in another matter and would be unable to assist in the trial of this case unless the same was continued for a period of approximately thirty days. This motion being denied, the defendant withdrew its counterclaim and the court ordered the cause tried upon the amended complaint and the remaining part of the answer. The defendant offered no evidence and the plaintiff recovered judgment, from which this appeal was taken.

The only contention here made is that the court abused its discretion in denying each of these motions for a continuance. The parties are in accord as to the general rules of law governing such a question, but disagree as to the application of those rules to the facts which here appear.

[1, 2] In support of the first motion for a continuance, the appellant presented an affidavit alleging that a period of not less than two months, and possibly longer, would be required and would be necessary to assemble and present the testimony in its behalf. After reviewing the general claim of misrepresentation as set forth in the answer, the affi-

davit proceeds to allege that much of the evidence required to sustain the claim made exists in the states of Delaware, New York, and Massachusetts; that a large part of said evidence is contained in the official archives of said states and covers a period of five years, from 1928 to 1932; that it would be indispensably necessary for the appellant to take the depositions of the secretary of state of the state of Delaware or of some official of that state who has custody of "certain important documents" filed there by Transamerica Corporation; that it will be necessary to take the depositions of an officer of the state of New York and of an officer of the state of Massachusetts in order to obtain "certain important documents" under their control and in their custody; that it will be necessary to take the deposition of an officer of the New York Stock Exchange; and that all of the evidence procurable by means of said depositions from these official sources is material and essential in order to permit the appellant to safely go to trial. It will be noted that the allegations of the affidavit thus far are exceedingly vague and it is in no way set forth what the important documents referred to are or what relation they have to this case. While it is alleged that all of this evidence is material, no facts are alleged to show its materiality. The affidavit then proceeds to allege that the appellant's counsel and accountants had been occupied for many weeks in tracing, finding, and locating the aforesaid evidence; that they have traced, found, and located the same; that they have not been able to procure the same although they have made a diligent effort to do so; and that it is affiants' belief that a reasonable postponement of the trial would enable them to procure and present to the court the aforesaid important testimony. Nothing is said as to what this evidence is which has been located, as to when it was found, or as to what is relied upon as showing diligence. The affidavit then goes on to allege that a large number of subsidiary corporations were organized in various states of the Union and used by the officers of Transamerica Corporation as "dummy" organizations for the purpose of assisting that corporation, its officers and agents, to perpetrate the frauds complained of by the appellant; that in order to procure and present the testimony relative to the fraudulent acts of said dummy corporations in aiding the Transamerica Corporation, and its officers and agents, in perpetrating the frauds upon the appellant, it will be necessary to take the depositions of "a large number of persons within and without the state of California, to-wit, the officers and agents of the aforesaid dummy corporations, and of the state officials who have custody and control of the various documents" relating to the organization, purposes, and acts of said dummy corporations; and that "the testimony expected to be procured from the above mentioned sources" is highly material to appellant's case. It is then alleged that the procuring of the above-mentioned testimony is and will be a task of great difficulty and magnitude; that it will require a great deal of time and effort on the part of the defendants and their counsel and accountants; that most of the evidence is in the hands of reluctant and hostile parties; and that the procurement thereof will be attended by great difficulty and will from time to time need the intervention of the court's mandatory authority. While it is here again alleged that this evidence is material, the nature of the evidence is not disclosed, the names of the persons whose depositions are desired are not given, facts showing diligence are omitted, and the language used suggests a hope that favorable evidence may be developed through the depositions, rather than a definite statement as to what testimony can be produced.

While this affidavit is lengthy, it is lacking in the essentials to which we have referred and, taken altogether, it fails to clearly allege facts showing what evidence is desired, the materiality thereof, and that the same will be available within a reasonable and definite time. The showing made as to diligence is indefinite and unsatisfactory. The appellant argues, in reply to the showing made by the respondent that he had offered in open court on April 3, 1933, to stipulate to the taking of any depositions desired, that it was necessary for it to have in its possession the data to be used in the interrogation of witnesses before the depositions could properly be taken, and that "it is idle to offer to stipulate to the taking of depositions if one is not in a position to know what inquiries should be made of the witnesses." While this is undoubtedly true, the argument indicates that the appellant did not yet know exactly what it wanted from the witnesses. While this may explain the indefiniteness of the affidavit upon which the application for a continuance was based, it further justifies the reasonableness of the court's ruling, under the circumstances. It cannot be held to be an abuse of discretion to refuse a continuance for the purpose merely of continuing a search for evidence when a case has been at issue for several months. It is well settled not only that the court has a large discretion in such a matter, but that no abuse thereof appears in the absence of a clear and definite showing that certain material evidence exists, and that it will be available within a reasonable time if a continuance is granted, together with a satisfactory showing of due diligence.

[3] The second motion for a continuance made on the day of the trial was based upon the grounds that the principal witness for the appellant was sick and unable to be in attendance and that the chief counsel for the appellant was engaged in another matter which prevented him from being present. The affidavit of a physician was presented stating that on May 17, 1933, Mr. Fawcett was confined to his bed suffering from a severe cold complicated by influenza, and that he would not be able to attend court for at least ten days or two weeks. In opposition to this, certain affidavits were filed in which the affiants stated that on May 17, May 18, and May 19, 1933, the witness in question was seen on several occasions leaving his home in an automobile; that he went to restaurants and to an office building; that on several of these occasions he remained from one to two hours before returning home; and that at these times he appeared to be in good health. There was also presented an affidavit stating that Mr. Fawcett was one of the principal witnesses for the appellant; that many matters necessary to the appellant's defense were known only to him; and that his presence at the trial was essential. No statement was contained therein as to what matters were within the knowledge of this witness or as to what would be his testimony, if present. In view of the absence of these facts in this affidavit and of the conflict presented by the other affidavits referred to, it must be held, under well-established rules, that the showing made, in so far as this witness is concerned, is not sufficient to justify a reversal of the order refusing a continuance. Other affidavits were presented setting forth that the chief counsel for the appellant was engaged in another matter and was unable to be present. While it is therein alleged that this counsel would be unable to be present on May 22, 1933, for the reasons given, any statements as to when he would be able to attend, if at all, are conspicuously absent. A further consideration is that the appellant was represented by other able counsel and it fully appears that neither the presence of Mr. Fawcett nor of the chief counsel referred to could have been of much value to the appellant in the absence of the evidence involved in the first application for a continuance. The fact that no sufficient showing was ever made that that evidence, admittedly necessary to establish appellant's defense, would be available at any time, furnishes an additional reason why the court did not abuse its discretion in denying the second application.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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3 Cal.App.2d 268

LOMBERA v. UNION PAVING CO. et al.

Civ. 9091.

District Court of Appeal, First District, Division 1, California.
Dec. 21, 1934.

Hearing Denied by Supreme Court
Feb. 18, 1935.

1. Automobiles 🔑240(3)

In action for injuries sustained by guest in truck which collided with telephone pole in order to avoid a collision with defendants' automobile, plaintiff *held* entitled to judgment against owners of automobile upon finding of only ordinary negligence, although complaint had charged gross negligence.

2. Appeal and error 🔑1039(13)

Owners of automobile sued for injuries to guest in truck which collided with telephone pole in order to avoid collision with automobile *held* not prejudiced by guest's failure to prove allegation of their gross negligence, where guest was required only to establish ordinary negligence of owners of automobile in order to recover against them.

3. Automobiles 🔑244(20)

In action by guest for injuries sustained when truck driver with whom guest was riding drove into telephone pole to avoid collision with automobile, evidence sustained finding that driver of automobile and not truck driver was negligent.

Appeal from Superior Court, San Mateo County; Franklin Swart, Judge.

Action by F. Lombera against the Union Paving Company, P. S. Pope, Verda Pope, and another. Judgment for plaintiff as against P. S. Pope and Verda Pope only, and they appeal.

Affirmed.

J. E. McCurdy, of San Mateo, for appellants.

Ross & Ross, of Redwood City, for respondent.

KNIGHT, Justice.

The defendant John L. O'Donnell, an employee of the defendant Union Paving Company, was driving a Ford truck belonging to said company in an easterly direction along Tilton avenue in San Mateo, and about the time he reached and started across the intersection of Fremont avenue a sedan automobile driven by the defendant Mrs. Verda Pope approached from the truck driver's left, on Fremont avenue, and started across said intersection; thereupon, and in order to avoid being struck by the sedan, so the truck driver claimed, he swerved suddenly to the right, and in doing so caused the truck to jump the curb at the southeast corner of the intersection and crash into a telephone pole. Plaintiff was riding as a guest on the truck with O'Donnell at the time of the accident and was injured; and on account of said injuries he brought this action for damages against O'Donnell, the paving company, Mrs. Pope, and her husband. The complaint alleged that the accident was proximately caused by the "grossly, careless and negligent manner" in which the two vehicles were driven. The trial took place before the court sitting without a jury, and upon the issue of negligence the court found: That "the defendant Verda Pope so carelessly and negligently drove and operated said Studebaker sedan automobile * * * as to cause the automobile in which plaintiff was riding to collide with a telegraph pole and proximately caused the plaintiff to strike his head with great force. * * * That said John L. O'Donnell did not drive or operate said automobile truck in a grossly careless or negligent manner, and that the said accident and injuries sustained by plaintiff were not due to or caused by any gross negligence on the part of the defendant John L. O'Donnell." Plaintiff's damages were fixed in the sum of $2,000, and judgment was entered in his favor and against Mrs. Pope and her husband for that amount; it being further adjudged that plaintiff recover nothing from O'Donnell and said paving company. From said judgment Mrs. Pope and her husband have appealed.

[1] Stated briefly, the first point made by appellants is that, plaintiff having charged in his complaint, in general terms, that Mrs. Pope was guilty of gross negligence, no judgment could be obtained against her based on a finding of ordinary negligence. In other words, it is contended that, when plaintiff failed to prove gross negligence on Mrs. Pope's part as alleged in the complaint, she was entitled to a nonsuit; that consequently the trial court's decision finding ordinary negligence is against law, and the judgment based thereon cannot be sustained. No authority in point has been cited by either side, nor, so far as our own research has extended, have we been able to find any case in this state deciding the disputed question. Respondent relies mainly upon certain language used in the decisions in Malone v. Clemow, 111 Cal. App. 13, 295 P. 70, Sumner v. Edmunds, 130 Cal. App. 770, 21 P.(2d) 159, and Castro v. Singh, 131 Cal. App. 106, 21 P.(2d) 169. But a different question was there being discussed; and moreover the recent case of Nichols v. Smith, 136 Cal. App. 272, 28 P.(2d) 693, decided since the filing of the briefs in the present appeal, holds the portions of the decisions in those cases, so relied on by respondent, to be dictum, and declares the same should not be followed. And in this connection may be cited also the still more recent case of Manica v. Smith, 138 Cal. App. 695, 33 P.(2d) 418, but it would seem that the decision therein in no way tends to clarify the confusion apparently existing among the cases above cited as to the correct rule to be applied in determining the particular question therein considered.

Aside, however, from whatever conflict may exist among those cases with respect to the specific question therein discussed, an investigation of the authorities from other jurisdictions discloses that the precise question here presented has arisen and been passed upon in several other states; and, while the conclusions reached have not been uniform, it seems to be conceded to be the better and sounder view that recovery may be had regardless of the refinements attributed to the terms employed by the pleader. Ruling Case Law (volume 20, p. 24), and Corpus Juris (volume 45, p. 1090) both so declare, and such declaration is supported by the citation of a number of cases. As said in the latter work, in summarizing the rule of those cases, the characterization in the complaint of the act of negligence as "gross" may be treated as a mere conclusion of the pleader and disregarded as surplusage without affecting the sufficiency of the complaint as a statement of a cause of action for ordinary or simple negligence. And the fundamental principle upon which the foregoing rule is based, as shown by those decisions, is that the greater includes the less. Howton v. Kearns, 226 Mich. 20, 196 N. W. 611; Gorton v. Harmon, 152 Mich. 473, 116 N.

W. 443, 445, 15 Ann. Cas. 461. As said in the case last cited: "Under a charge of murder the defendant may be found guilty of crimes of lesser degree. It would certainly reflect upon the wisdom of the law that would permit parties to be found guilty of lesser crimes, though not specifically charged therewith, but would not permit recovery in a civil action where a greater degree of negligence is charged, but which includes the less."

[2] Furthermore, in a case such as we have here, a defendant is aware from the beginning that regardless of the allegations of the complaint his liability attaches upon proof of ordinary negligence; and it is evident therefore that he is not prejudiced nor in any way taken at a disadvantage by the fact that plaintiff has seen fit for some reason to allege in his complaint a greater degree of negligence than he is required by law to establish by his evidence.

[3] Appellants further contend that in any event the evidence is legally insufficient to sustain the trial court's finding of ordinary negligence. The transcript shows, however, that such finding is based upon a sharp conflict of testimony relating to the material circumstances under which the accident occurred. In this regard the truck driver testified that he approached the intersection at a speed of 15 miles an hour; that, when about 20 or 25 feet from the intersection, he saw the sedan, which was then 30 to 35 feet north of the intersection, and traveling at a speed of approximately 25 miles an hour; that as soon as he saw the sedan he stepped on the gas to speed ahead, and that the driver of the sedan did likewise; that, although the truck entered the intersection first and was proceeding across it, the sedan did not slow up or concede the right of way, but continued on into and proceeded across the intersection, and was only 10 feet away from him when the front end of the truck reached the center of the intersection; that, in order to avoid being struck by the sedan, he turned suddenly to the right, and, as stated, the truck jumped the curb and struck the telephone pole. Mrs. Pope testified in substance that she approached the intersection at about 15 miles an hour and was about 30 feet therefrom when she first saw the truck, which was then about 25 feet from the intersection and traveling faster than she was; that she stopped her car when it was about halfway across the northerly line of the intersection in ample time to avoid a collision even though the truck had continued in a straight course across the intersection; and that the belief on the part of the truck driver that she was about to collide with him was entirely unwarranted and his sudden swerving of the truck unnecessary. In contradiction of her testimony, however, the truck driver testified that she drove clear through the intersection and did not bring her sedan to a stop until she reached a point some 30 feet on the other side thereof. There were other witnesses to the accident, but their testimony only adds to the conflict. In the state of the evidence above set forth it is beyond the power of this court to interfere with the conclusion reached by the trial court as to the truth of the matter.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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3 Cal.App.2d 199

BLESER v. THOMAS HAVERTY CO. et al.

Civ. 8468.

District Court of Appeal, Second District,
Division 1, California.

Dec. 19, 1934.

Rehearing Denied Jan. 8, 1935.

Hearing Denied by Supreme Court
Feb. 14, 1935.

1. Trial ⇨165

On motion for nonsuit, plaintiff's evidence must be deemed true, together with favorable inferences therefrom.

2. Negligence ⇨136(18)

In action by independent contractor's employee against separate independent contractor and his employees who, in assisting plaintiff to construct scaffold, allegedly forced plaintiff therefrom while handing plank up to plaintiff, evidence *held* sufficient for jury as against contention that defendants were volunteers, where it appeared that defendant contractor as well as plaintiff's employer used such scaffold.

3. Master and servant ⇨302(1)

Employee's act, when connected with employer's business and furthering employee's work and calculated to benefit employer, is within general scope of employment as regards employer's liability to third person injured thereby.

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

4. Negligence ⚷55

Independent masters engaged about same general employment must use ordinary care so as not to endanger other master's servants.

5. Negligence ⚷136(5)

In negligence case, if any evidence shows legal duty and lack of ordinary care in observance thereof, nonsuit cannot be granted.

6. Negligence ⚷136(26)

In action by independent contractor's employee against separate independent contractor and his employees who, in assisting plaintiff to construct scaffold, allegedly forced plaintiff therefrom while handing plank up to plaintiff, plaintiff's contributory negligence *held* for jury.

7. Negligence ⚷105

In action by independent contractor's employee against separate independent contractor and his employees who, in assisting plaintiff to construct scaffold, allegedly forced plaintiff therefrom while handing plank up to plaintiff, principle of assumed risk *held* inapplicable.

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Don Bleser against Thomas Haverty Company and others. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Lasher B. Gallagher, of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondents.

ROTH, Justice pro tem.

This appeal is from a judgment of nonsuit.

Plaintiff was employed by Howe Bros., who, as an independent contractor, was installing plumbing fixtures in the Edison building in Los Angeles. Defendant Haverty, as a separate independent contractor, was installing sheet metal works in the same building. Defendants Miller and Galloway were employees of Haverty.

Between 9 and 10 a. m. on June 24, 1930, when the accident occurred from which this lawsuit arises, defendant employees had prepared a scaffold 12 feet high (which will hereafter be referred to as the Haverty scaffold) as the base from which they were to perform their work. Plaintiff, as an employee of Howe Bros., was constructing a second scaffold (which will be referred to as the Howe scaffold) at right angles and immediately contiguous to the Haverty scaffold. In the construction of the Howe scaffold plaintiff was assisted by one Azzoni, also an employee of Howe Bros. Defendants Miller and Galloway also assisted, although it is not clear from the evidence whether they did so from their own volition or at the request of plaintiff.

During the construction plaintiff was at the top of the Howe scaffold, standing or kneeling on one plank that had already been laid over two "horses" 12 feet high. While he was in this position his fellow employee Azzoni would climb a ladder-like arrangement built into one of the horses, holding the rungs of the ladder with his left hand while one end of the planks which were to form the base of the scaffold and which were 2 inches by 12 inches by 18 feet long rested on the palm of his right hand, much as a "waiter carrying a tray." The defendants Miller and Galloway carried the other end of the planks, gradually "feeding" the same as Azzoni mounted the ladder until he had attained enough height to hand the planks to plaintiff. After plaintiff grasped the planks, Miller and Galloway on the floor beneath would continue the feeding process until plaintiff, with the aid of another employee of Howe Bros. at the other end, was in a position to lift the planks out of their grasp and lay them on the horses.

In this manner three planks had been laid. In attempting to lay the fourth the accident occurred, according to eyewitnesses, in the following manner:

Azzoni testified:

"A. Yes. When I handed my end to him and I started to come down, and Bleser was on his knees shoving the plank—or pulling the plank with him as he went back to the center of the scaffold, and these two Haverty men were gradually feeding it to him, just holding up their end and feeding it to him, when I was just about down, I heard him say, 'Whoa!' or 'Hold it!' and just that second I saw him fall, and his right arm caught over the plank I was standing on, and swung his feet underneath that, inward, and his ankle caught on a cross beam of the horse, and that kind of turned him over, and he went face downward towards the concrete, and he lit on his elbows and his face. * * *"

The witness Brazelton testified:

"A. He just took hold of the plank, on his knees, and crawled maybe three or four feet and told the men to 'Stop!' and 'Ho!' or 'Hold!' as he said * * *

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

"Q. And did you see them do anything immediately thereafter? A. They were still shoving the plank.

"Q. After he had told them to stop? A. Yes, sir.

"Q. And what happened to Bleser? A. He fell off; lost his balance and fell off of the plank.

"Q. Now, at the time Mr. Bleser—withdraw that. Just prior to the time Bleser went off of the scaffold, what was he doing with reference to his position; was he still down on his knees, or was he doing something else? A. Mr. Bleser, you mean?

"Q. Yes. A. He was on his knees. * * *

"Q. * * * That is, was there any sheet between them, of anything? A. Nothing.

"Q. Nothing—nothing but air? A. That is all."

The plaintiff Bleser testified:

"A. Why, when they were handing up the plank—I was standing up, first, when they were handing up the plank, and I naturally got down on my knees to reach the plank and get the end of it on the horse. After it was on the horse, I pulled the end say about a foot, and then I said, 'Hold it!' I wanted to change my position. I had it between my legs. I said 'Hold it!' and I was just going to swing my right leg around to get on the Haverty scaffold along with the plank then, and just as I did that they shoved on it and knocked me over. * * *

"Q. When you said 'Hold it,' was there any stopping in the motion of the plank at all? A. There was for maybe two or three seconds.

"Q. And then what happened? A. And then they got up and shoved all of a sudden, and that was what overbalanced me."

The defendant Galloway testified:

"Q. The first thing he said was that you pushed him? A. That is the first thing he said, yes.

"Q. So you did give those answers to those questions didn't you? A. Yes, sir.

"Q. So you did have a conversation with Mr. Bleser immediately after the accident, didn't you? A. No, sir.

"Q. Well he told you you pushed him off, didn't he? A. Well that is no conversation."

It appears from the evidence that in doing their respective jobs at this place in the Edison building, the Haverty men followed the Howe men. The record shows that the Howe scaffold, the completion of which was temporarily delayed by the accident, was thereafter completed, and that the same afternoon and on the following day the Haverty men, having done all the work they could using the Haverty scaffold as an operating base, proceeded to use the Howe scaffold, doing all they could in the line of their work with the Howe scaffold as an operating base.

Defendants' motion for nonsuit was based on the grounds that defendants were not guilty of negligence; that the evidence was wholly insufficient in law to establish a cause of action; that the undisputed testimony showed that no contractual relation existed between the parties, for which reason no legal duty rested upon the defendants to take any particular care or exercise any particular caution, but that they were merely volunteers and that as such the limit of their duty was to refrain from wanton or intentional injury to the plaintiff.

[1, 2] That on a motion for nonsuit all the evidence of plaintiff must be accepted as true and all inferences that can be drawn therefrom in plaintiff's favor must be drawn is too trite a principle to need citation of authority for its acceptance. Measuring the evidence in the light of this principle, we feel that the motion for a nonsuit was erroneously granted. It may be conceded as a fact that defendants owed no contractual duty of assistance to plaintiff. But this concession of fact is immaterial. The sole questions are: Did the employees of Haverty render the assistance they gave within the scope of their employment, and, if they did, what degree of care was required of them under the law?

It is true that the evidence does not show an express agreement, oral or in writing, made prior to the accident between the respective employees of the respective independent contractors that the Howe scaffold was to be subsequently used by defendants, and if defendants had rested their case we would be bound to agree with what was evidently the trial court's conclusion—that there was none. But it requires no mental strain to infer from the evidence that the defendants Miller and Galloway assisted in the construction of the Howe scaffold because they were to use it properly and in the scope of their employment as a base for their own work as, in fact, the evidence demonstrates they did. If this inference be sound, and we think it is, the defendants were not volunteers but employees of one separate contractor assisting the employees of a second separate contractor in the construction of a scaffold which both were to use in the performance of their labors. It is true that there was no compulsion, contractual or otherwise, requiring Haverty's employees to assist in the construction of the Howe scaffold at the time, but it is fair to assume from the evidence that they figured they would save the time of their employer if they did so rather than leave to chance his right to subsequently use the Howe scaffold. The assistance the Haverty employees rendered was both workmanlike and in the scope of their employment, unless it can be found that to save the time of one's employer by co-operating with the employees of a separate employer in the doing of a preliminary piece of work essential to the performance of the labors of each separate contractor was specifically unauthorized or in some manner inimical to their employers' interests. Neither of these elements is shown by or can be inferred from the evidence and, under the rule of nonsuit which we have already announced, our duty would be to draw no such adverse inferences.

[3] When the act of an employee is connected, directly or indirectly, with the business of the employer, and in furtherance of the work the employee is directed to perform and the act is calculated to result directly, indirectly, or incidentally to the benefit of the employer, there can be no question but that such act is within the general scope of the servant's employment. Kish v. California S. Automobile Ass'n, 190 Cal. 246, 249, 212 P. 27; Chamberlain v. Southern California Edison Co., 167 Cal. 500, 506, 140 P. 25; Mullia v. Ye Planry Building Co., 32 Cal. App. 6, 161 P. 1008; Gousse v. Lowe, 41 Cal. App. 715, 719, 183 P. 295.

[4] The care which is required under such circumstances is well stated in Grogan v. J. H. Hinkle & Co., Inc., 70 Pa. Super. 585, 588, where it is said: "* * * It is the duty of independent or different masters engaged about the same general employment to use such ordinary care and diligence in the conduct and prosecution of their several contracts or employments so as not to expose the servants of the master working with them to danger and if injury results to the servants of either, through failure to exercise such care and diligence, the master whose servants caused the injury will be liable in damages. * * *" Spry Lumber Company v. Duggan, 182 Ill. 218, 54 N. E. 1002; Fetzer v. Noel Constr. Co., 175 Ill. App. 401; Variety Mfg. Co. v. Landaker, 129 Ill. App. 630, affirmed 227 Ill. 22, 81 N. E. 47; Grogan v. J. H. Hinkle & Co., Inc., 70 Pa. Super. 585.

The cases last cited deal with situations in which the servants of the independent contractors were engaged in separate work in their several capacities rather than in a piece of work in which they had joined to better and more efficiently accomplish their several tasks. We see no reason, however, why the rule is not as applicable to the instant situation as it is to the facts of the cases cited.

[5] Analyzing the evidence as summarized, together with the brief excerpts quoted, and keeping in mind that a nonsuit cannot be granted if there is any evidence which will support plaintiff's position that there was a legal duty existing and a lack of ordinary care in the observance thereof, we are impelled to the conclusion that a jury could have reasonably inferred from the evidence as it existed at the time the motion for nonsuit was made that there was a duty and a lack of ordinary care in the performance therof.

[6, 7] The evidence shows no contributory negligence as a matter of law, and we are of the opinion that the principle of assumption of risk has no application to the facts.

Judgment of nonsuit reversed.

We concur: CONREY, P. J.; YORK, J.

2 Cal.App.2d 739

VINCENZINI v. FIORENTINI.

Civ. 9232.

District Court of Appeal, First District, Division 1, California.

Dec. 11, 1934.

Hearing Denied by Supreme Court Feb. 7, 1935.

1. Homestead ⇨33

Where two separate houses stand upon real property sought to be impressed with a homestead, one of which is occupied as a dwelling by claimant and other is rented to tenants, both houses cannot be dedicated as a homestead (Civ. Code, § 1237 et seq.).

2. Homestead ⇨33

If there is but one building a portion of which is used bona fide as a family residence, fact that other portions are rented to tenants does not impair right to select structure and land as a homestead (Civ. Code, § 1237 et seq.).

3. Homestead ⇨5

Homestead statute must be liberally construed (Civ. Code, § 1237 et seq.).

4. Appeal and error 🔑1010(1), 1011(1)

In proceedings involving validity of a homestead, findings will not be disturbed if there is any evidence to support them or a conflict in evidence (Civ. Code, § 1237 et seq.).

5. Homestead 🔑57(3)

Evidence supported implied finding that improved structure, consisting of dwelling and addition thereto made to provide accommodation for owner's daughter and husband who occupied it as tenants at will without rent, except for period when it was rented to others, was essentially but one building, which was dedicated as a homestead, and therefore improved structure was exempt from attachment (Civ. Code, § 1237 et seq.).

Appeal from Superior Court, San Mateo County; Franklin Swart, Judge.

Action by Angelo Vincenzini against Giuseppe Fiorentini. From an order discharging an attachment on land, plaintiff appeals.

Order affirmed.

J. W. Coleberd and H. W. Call, both of South San Francisco, for appellant.

Hankins & Hankins, of San Francisco, for respondent.

PER CURIAM.

An appeal from an order discharging an attachment on portions of three lots title to which stands of record in the name of Rosa Fiorentini, the wife of defendant. The action was brought against the latter to recover rent due and unpaid under a lease. Attachments issued and were levied on the lots mentioned. Previous to the filing of the action said Rosa Fiorentini filed a homestead on the property in which she alleged the same to be her separate property. The declaration further alleged that she and her husband and their two children were actually residing thereon, and that the improvements on the property consisted of a "one-story and basement residence and outbuildings," the total cash value of which was $4,000.

The grounds of the motion for the discharge of the attachments were that the property was exempt from execution and that the levy thereof cast a cloud on the title. A counter affidavit filed by plaintiff alleged that at the time of the filing of the homestead declaration and at all times thereafter there were two dwelling houses on the property, one occupied by declarant and the defendant and the other occupied by tenants of the declarant and the defendant. At the hearing, testimony supporting and opposing the motion was offered, and at the conclusion thereof the court determined that all the property described in the declaration was exempt and made its order accordingly.

It is undisputed that in 1918 the declarant and her husband erected a four-room dwelling on the property. Its dimensions are 22 by 24 feet. In 1924 declarant erected a smaller structure by the side of the existing dwelling to be used by one Herrera, who was affianced to declarant's daughter; it being intended that it should be occupied by the daughter and her husband as their home. It abuts on the original dwelling, the north wall of which serves as the south wall of the new building. The dimensions of the latter structure are 20 by 24 feet, and its lean-to roof projects from the side of the old building. The floor of the new structure is about 2 feet lower than that of the latter, and there is no connecting door between the two, although one chimney is used for both. A concrete walk leads from the street to a point about 10 feet from the two structures; it then divides and terminates at the front entrance of each. To the north are certain outbuildings used as garage, storeroom, and chicken house by declarant and her family and by the occupants of the later structure. Herrera occupied this for a year before he married declarant's daughter. At a later period, while he and his wife were absent, the same was occupied by others, who paid rent therefor to declarant. Still later Herrera and his wife returned and took and still hold possession as tenants at will. The two portions of the enlarged building have separate gas and electric service, and it also appears that the larger portion of the surrounding premises was at all times used as a garden, and there are fruit trees planted along the concrete walk.

[1, 2] It has been held that, where two separate houses stand upon the real property sought to be impressed with a homestead, only one of which is occupied as a dwelling by the claimant, the other being rented to tenants, an attempt to dedicate both as a homestead is inoperative. Tiernan v. His Creditors, 62 Cal. 286; Maloney v. Hefer, 75 Cal. 422, 17 P. 539, 7 Am. St. Rep. 180; In re Ligget, 117 Cal. 352, 49 P. 211, 59 Am. St. Rep. 190. However, if there be but one building, a portion of which is used bona fide as a family residence, the fact that other portions are rented to tenants does not impair the right to select the structure and the land on which it is situated as a homestead.

Ackley v. Chamberlain, 16 Cal. 181, 76 Am. Dec. 516; Heathman v. Holmes, 94 Cal. 291, 29 P. 404; Skinner v. Hall, 69 Cal. 195, 10 P. 406; Estate of Ogburn, 105 Cal. 95, 38 P. 498; McKay v. Gesford, 163 Cal. 243, 124 P. 1016, 41 L. R. A. (N. S.) 303, Ann. Cas. 1913E, 1253; Schmidt v. Denning, 117 Cal. App. 36, 3 P.(2d) 322; Estate of Levy, 141 Cal. 646, 75 P. 301, 99 Am. St. Rep. 92. It has also been held that the land on which the dwelling is situated may within the meaning of the statute include a garden, a chicken yard, or an orchard (Arendt v. Mace, 76 Cal. 315, 18 P. 376, 9 Am. St. Rep. 207; Davis v. Lockwood, 110 Cal. App. 114, 293 P. 631), together with outbuildings of any kind convenient or necessary for family use (Gregg v. Bostwick, 33 Cal. 220, 91 Am. Dec. 637), and the status of the land as a part of the homestead is not affected by the mere fact that it may be intersected by highways, streets or alleys (13 Cal. Jur. Homesteads, § 37, p. 464). Also in Estate of Levy, supra, it was decided that a building consisting of flats suitable for residential purposes, in one of which the owners are residing, is a proper subject out of which to carve a homestead. As was said in In re Allen, 2 Cal. Unrep. 835, 16 P. 319, each case must depend in a great measure upon its own circumstances. Here the evidence fairly shows that the new structure was no more than an addition to the original dwelling, and that the primary object of its erection was to provide accommodation for the claimant's daughter and her husband, who, with the exception of a period during which they were absent from the county, occupied it apparently as tenants at will without obligation with respect to the payment of rent. It may be added that they were occupying it as such tenants at the time the declaration of homestead was filed. That during their absence this portion of the structure was rented to others by the claimant is not under the above decisions material. See, also, Lima v. County Bank, 142 Cal. 245, 75 P. 846.

[3, 4] The homestead statute (Civ. Code § 1237 et seq.) is a remedial measure, and should be liberally construed (Heathman v. Holmes, supra; McKay v. Gesford, supra); and in proceedings involving the validity of a homestead, findings will not be disturbed if there is any evidence to support them or a conflict in the evidence. (12 Cal. Jur. Homesteads, § 138, p. 564).

[5] The evidence fairly supports the implied conclusion of the trial court that the improved structure constituted essentially but one building, and the order is accordingly affirmed.

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